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[1] and hook up their phones?

[2] A: They — some of them did that. Others,
[3] when they were moving or building a new place,
[4] started having them wired to accept these alternative
[5] units. It was — excuse me — sometime about that
[6] time that they started these phone center stores —

[7] Q: Who did?

[8] A: — which — the Bell system, which would
[9] sell you the shell and lease you the innards, trying
[10] to persuade you not to go out and buy all of these
[11] fancy competitive phones, that you really could have
[12] what you wanted, as well.

[13] Q: That was about the time that you bought
[14] your Mickey Mouse phone?

[15] A: Right.

[16] Q: All right?

[17] A: Yes.

[18] Q: Now, the — let's go forward here now and
[19] let's talk about competition, okay? How did this
[20] competition develop? How did it work? What
[21] percentage of the market was grabbed by these retail
[22] sales?

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[1] A: I — in '75, '76, the answer is I don't
[2] know. They grabbed some — I would say a small
[3] percentage, a very small percentage.

[4] Q: Why did they only grab a small percentage?

[5] A: For a couple of reasons. One is that it
[6] wasn't easy to hook up a phone and, two, is that
[7] the — the phone instrument itself was frequently
[8] bundled. Three was that some state tariffs required
[9] you at that point to take the phone from the phone
[10] company and, four, was even where it was optional, it
[11] was still offered at a sufficiently low rate so it
[12] was very hard to be competitive with it.

[13] Q: Okay. Let me — let's walk through all of
[14] these. The first one, I think you said, is that it
[15] was a little bit difficult to hook up.

[16] A: Yes.

[17] Q: Did that change in years to come?

[18] A: Yes. Yes, it did.

[19] Q: So it became easier to hook up?

[20] A: Yes, I mean with respect to — to both
[21] the — the installation of the jack yourself, it
[22] became something that anybody handy could do, and

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[1] with respect to anywhere that had a modular jack
[2] there, it became at least as easy as plugging in an
[3] electrical appliance.

[4] Q: What changed about the hookup from '75 to
[5] '84?

[6] A: What changed was the introduction of two
[7] types of jacks. One was — I think it is a four-
[8] prong and the other was the module.

[9] Q: So the — the introduction of different
[10] jack technology made it easier?

[11] A: Yes. The modular was — is, as I say, a
[12] dramatic change.

[13] Q: What was the first jack that was available
[14] in '75?

[15] A: I think it was a four-prong.

[16] Q: And you think that was a difficult one as
[17] an obstacle to sale?

[18] A: Oh, yes. Yes.

[19] Q: Okay. And what was different about the
[20] second or subsequent jack?

[21] A: The modular, is, as I say, is a basic —
[22] there is no wiring or anything. It is a plug-in. It

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[1] is simpler than a — an electrical plug, less
[2] threatening.

[3] Q: When did that jack, second type jack, come
[4] into play?

[5] A: I don't know when it was first introduced.
[6] I guess very late seventies.

[7] Q: '79?

[8] A: '78, '79.

[9] Q: Okay. Was there a dramatic change in the
[10] competition when that modular jack was introduced?
[11] In other words, did the number of CPE sales go
[12] through the roof when they introduced that jack?
[13] A: Not immediately. It took a while for
[14] people to sort of gear up to meet it but I think
[15] there was significant investment in entry into the
[16] CPE business thereafter.

[17] Q: So when did the sales start increasing?

[18] A: Sales by non-Bell system or sales by Bell
[19] system? I mean at the —

[20] Q: Either one. I'm talking about — I'm
[21] talking about sales.

[22] A: Okay. Sales by Bell system, I — if I had

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[1] to make a guess, I would guess probably started
[2] around '77 and accelerated after '78.
[3] Q: All right. So give me the percentages of
[4] sales as an erosion of the lease base for each year
[5] after that.
[6] A: I — I don't know. I guess about 10
[7] percent a year.
[8] Q: 10 percent of the — of the lease base was
[9] disappearing a year?
[10] A: Yes.
[11] Q: So what? About, what, eight or nine, 10
[12] million people a year were leaving?
[13] A: Yes, with new people coming on.
[14] Q: Okay. What about the Bell Operating
[15] Companies lease space? How much of it was leaving a
[16] year?
[17] A: This at the time was all Bell Operating
[18] Companies lease space.
[19] Q: In what year are you talking about? '77?
[20] '78?
[21] A: Yes.
[22] Q: We are talking about Bell Operating

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[1] Companies.
[2] A: Up through divestiture.
[3] Q: All right. Now, you think maybe 10 million
[4] people a year are buying phones and getting out of
[5] the lease.
[6] A: I — yes, that would be my guess.
[7] Q: And that was steady for what period of
[8] time?
[9] A: I would think it would be accelerating
[10] from — if the period we are looking at now is '78
[11] through '84 —
[12] Q: You are starting at '75.
[13] A: Oh.
[14] Q: You started in '75.
[15] A: Very low in '75 to '78.
[16] Q: Low? How many numbers?
[17] A: I don't know.
[18] Q: Do you know what a diffusion or an adoption
[19] process is?
[20] A: A — I'm sorry?
[21] MR. BENNETT: Objection to the form of the
[22] question.

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[1] BY MR. TILLERY:
[2] Q: Do you know what an adoption process or
[3] analysis is? Have you ever heard of that?
[4] MR. BENNETT: Objection.
[5] THE WITNESS: Vaguely familiar but I could
[6] not tell you what it is.
[7] BY MR. TILLERY:
[8] Q: In your regulatory economics, have you ever
[9] taken that into account?
[10] A: The adoption?
[11] Q: Yes, the adoption process.
[12] A: If you mean by it the pace at which a new
[13] technology will penetrate, the answer is yes,
[14] although not through a formal analysis that called it
[15] a diffusion or adoption process. If it is something
[16] different, the answer is I don't know but, once
[17] again, not by referring to it as the diffusion or
[18] adoption process.
[19] Q: All right. Well, let's say that it is, in
[20] fact, the rate by which new technology is purchased.
[21] Okay?
[22] A: Uh-huh.

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[1] Q: When would the beginning of the adoption
[2] process take place here in this case?
[3] A: '75, probably.
[4] Q: '75?
[5] A: Yes. I mean it is — it is hard because
[6] the technology — you say if it is the adoption of a
[7] new technology. I'm not sure how to define what is
[8] the new technology here. We had a continually
[9] evolving range of technologies. I think one probably
[10] could characterize competitive non-Bell CPE as a
[11] technology. One could characterize modular plugs as
[12] an additional technology.
[13] Q: Would phones — would you call the sale
[14] phone versus a leased phone new technology?
[15] A: No, I wouldn't say that's a technology.
[16] The — an answering machine combined with a phone I
[17] would call a technology — an answering machine
[18] probably would be a new technology.
[19] Q: Would call the sale of a phone an
[20] innovation versus the lease of a phone?
[21] MR. BENNETT: Objection to the form of the
[22] question.

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[1] had dropped off and it was down to about, say, 55 to
[2] 60 percent or so of that number but —

[3] Q: Do you know what number by percentage
[4] dropped off each year thereafter?

[5] A: I certainly couldn't tell you that today.

[6] I — I know I have seen in at least one appendix, I
[7] think it was of one of the — the expert reports of
[8] your experts, numbers, but I don't even know if that
[9] was for every year. I think it was for a few years.

[10] Q: Why was it that the number diminished on a
[11] fairly regular basis in your view after '86?

[12] MR. BENNETT: Object to the form of the
[13] question.

[14] THE WITNESS: For a number of reasons. One
[15] is that each time somebody moved, they were — the
[16] embedded base would go away.

[17] BY MR. TILLERY:

[18] Q: My — I'm only talking about embedded base
[19] customers now.

[20] A: Yes, so any time somebody moved, they were
[21] stopping an embedded base customer for that piece of
[22] equipment. Wherever they were, it was no longer

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[1] there. They — they weren't taking it. There were
[2] lots of moves. The second is that AT&T, once again,
[3] exactly as we anticipated, had fairly regular price
[4] increases and that because there were lots of
[5] substitutes available at any price level, fewer and
[6] fewer people wanted to take it. It wasn't that
[7] people wanted to lease. It is how many people wanted
[8] to lease at any given price and the higher the price
[9] is, the smaller the percentage of people would want
[10] to lease at that price.

[11] Q: On page 5 and 6, I think, bottom of 5, over
[12] to the top of 6 of your report, you state that,
[13] "Prior to the AT&T breakup, state public utility
[14] commissions had adopted regulatory policies that
[15] required AT&T to provide CPE to telephone customers
[16] at artificially low prices"; correct?

[17] A: Yes.

[18] Q: And that's correct; right?

[19] A: Yes. I think I have mine broken at a
[20] different point but the — the one that I have going
[21] over is this meant that price but —

[22] Q: But that's a correct statement?

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[1] A: Yes.

[2] Q: All right. Is it your view that the 1 to
[3] \$2-per-month charge that the Bell Companies charged
[4] for consumer peak CPE in the early 1980s was an
[5] artificially low price?

[6] A: Yes.

[7] Q: On page 6 of your report, you state, "If
[8] the price for a product is held artificially below
[9] its market price, competition simply cannot develop
[10] for that product." Is that correct?

[11] A: For — yes, the answer is yes, although I
[12] probably would say, "full competition," but yes.

[13] Q: Well, you didn't say, "full competition,"
[14] did you?

[15] A: No, I said it can't develop and it can't
[16] develop fully.

[17] Q: So you said if a product is held
[18] artificially below its markets price, competition
[19] simply cannot develop for that product.

[20] A: Yes, it can't develop, yes.

[21] Q: Okay. You must believe that there was not
[22] a lot of competition prior to the AT&T breakup;

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[1] right?

[2] A: I believe it was underdeveloped
[3] competition. It didn't develop.

[4] Q: Well, if competition didn't develop, then
[5] it is not competition, is it?

[6] A: No. It is — it is not full competition.
[7] That's why I use the word "develop."

[8] Q: Why don't you tell me what —

[9] A: "Develop" means mature or reach full
[10] flower.

[11] Q: So are we now in a qualitative state of
[12] competition; is that what you are telling me?

[13] A: That's what the FCC always — absolutely.
[14] The FCC — the FCC has always, and I know I refer to
[15] this in one of the earlier bits of testimony, saying
[16] that competition is not a binary yes/no decision from
[17] the public interest perspective. The FCC has never
[18] viewed it that way. It has viewed developing degrees
[19] of competition with different regulatory approaches
[20] that look at the fine distinctions or the continuum
[21] rather than a yes/no decision.

[22] Q: Well, tell me, then, prior to '84 what the

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- [1] competition was for lease CPE.
[2] A: Sold CPE.
[3] Q: Sold CPE?
[4] A: Yes.
[5] Q: Okay. Tell me how that was working out.
[6] Explain who was in that market. By the way, when did
[7] that start?
[8] A: Well, residential CPE, as a practical
[9] matter, I think, started with the — the Part 68
[10] certification proceeding that let people certify
[11] equipment that could be connected directly to the
[12] network. That would have been around '75, '76.
[13] The — prior to that, it was possible to attach CPE
[14] to the network through what was called a PCA,
[15] protective coupling arrangement, but the extra
[16] expense and trouble of that, I would say, as a
[17] practical matter, eliminated that from the
[18] residential marketplace.
[19] Q: So competition started in '75 or '76?
[20] A: Yes.
[21] Q: Okay. Tell me what that competition was.
[22] A: It was a number of manufacturers who had —

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- [1] who offered a fairly good range, an increasing range
[2] each year, of competing units.
[3] Q: This is Radio Shack and this sort of —
[4] A: Yes, Tandy — what's interesting is, as I
[5] sit here, I look at a Radio Shack thing there and
[6] they are a purveyor of CPE and I look at Sony and
[7] they are a purveyor of CPE.
[8] Q: Were they in '75 and '76?
[9] A: I'm not sure when Tandy entered. Tandy,
[10] you know, by 1980, was a provider of such equipment.
[11] And there were lots of almost house brands. By the
[12] late seventies, people started manufacturing this,
[13] primarily in Asia, I think a little bit in Mexico but
[14] primarily in Asia, and these started with Part 68,
[15] started to come in. There were a lot of issues about
[16] what could get certified.
[17] Q: Okay. Then let's start with the first year
[18] this competition began. Was it '75 or was it '76?
[19] A: I don't know.
[20] Q: Let's pick '75. Okay? You pegged that to
[21] the time when they could put their phones, purchase
[22] the phones, on the network.

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- [1] A: Directly without a PCA.
[2] Q: Right. And there was no real significant
[3] financial impediment to connecting up. They could go
[4] out easily, go to a phone — go to an electronics
[5] store, go some other place, buy a phone and hook it
[6] up to their system and do it legally, correct? Could
[7] they do it then?
[8] A: Yes. Once it was — any Part 68 device
[9] could be hooked up to the network legally so — it
[10] would not be certified but at that point you had to
[11] get an appropriate jack that would be able to handle
[12] it.
[13] Q: All right. Now, let's take these customers
[14] of the Bell Operating Companies at that moment in
[15] time who are going to subsequently become the
[16] embedded base customers of AT&T in January 1, '84;
[17] okay?
[18] A: Uh-huh.
[19] Q: Are you with me?
[20] A: I think so.
[21] Q: How many of them were there in '75?
[22] A: I don't know.

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- [1] Q: Were there more of them in '75 than there
[2] were in '84 or less?
[3] A: Are you talking about accounts or —
[4] Q: Both. You pick.
[5] A: Okay. I — I would suspect that there were
[6] fewer instruments in '75 than there were in '84.
[7] Q: When you say, "fewer instruments," you are
[8] talking about that were subject to phone lease
[9] accounts?
[10] A: Yes, the units themselves rather than the
[11] number of accounts —
[12] Q: Right.
[13] A: — number of customers.
[14] Q: Okay. Were there — were there more
[15] customers in '75 or fewer customers than compared to
[16] '84?
[17] A: Interesting question. The answer is I
[18] don't know. I guess more but I don't know.
[19] Q: All right. Now, tell me how this
[20] competition started. Started through advertising?
[21] A: Yes.
[22] Q: Okay. Did people then go to stores and buy

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[1] is for those people who wished to continue leasing,
[2] what were their — what was the competitive
[3] marketplace for those people? Was there competition
[4] in that market?

[5] MR. BENNETT: I believe that question has
[6] been asked and answered.

[7] THE WITNESS: I'll try again. If somebody,
[8] despite the fact that it makes no economic sense, in
[9] my judgment, to lease, wants to insist on leasing,
[10] there has not been a new entrant, the FCC never
[11] expected there would be an additional entrant, the
[12] FCC, I think, as I testified, expected the business
[13] to drop off probably even a little more quickly and
[14] go away. It is the same thing. Once AT&T, if at
[15] some point they withdraw from this market, which they
[16] are free to do on their own accord and which I assume
[17] they are going to do some day, if you say what is the
[18] protection or rights of somebody who wants to list
[19] CPE thereafter, the answer is none. People have lots
[20] of rights to get CPE but not to do it in a manner
[21] that they dictate where the market won't support it.

[22] Q: You said that they anticipated the market

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[1] would dry up.

[2] A: Yes.

[3] Q: Was that known before 1984?

[4] A: Was it known that it would dry up?

[5] Q: Yes, was it — let me ask it this way: Was
[6] it anticipated by the FCC that this — this lease
[7] market would dry up?

[8] A: The market, as it was known, that included
[9] a bundled service, insurance and everything like
[10] that.

[11] Q: Well, bundled service was being
[12] terminated. I'm talking about —

[13] A: I'm sorry. I'm talking about a different
[14] bundle, not bundling — I'm sorry. You made a good
[15] point because we have used the term elsewhere. I'm
[16] not talking about bundling CPE with basic local
[17] telephone service, I'm talking about the bundle of
[18] CPE services that AT&T has offered and which were
[19] offered even where it was a separate line item
[20] unbundled, which were offered together as a small
[21] bundle by all the telephone companies, which is the
[22] equipment, repair or replacement of the equipment and

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[1] service. Because it cost dramatically more to — to
[2] provide service like that, and the pricing of it was
[3] viewed as being — I mean the strong belief to the
[4] best of my knowledge everybody at the FCC had, and I
[5] think many, many people outside the FCC had, as well,
[6] is that the — the pricing of that service was
[7] totally non-market-driven and was way below the cost
[8] of providing the service. It was — I don't know if
[9] knowledge — I don't know how anybody can know
[10] anything in the future. It was a strong belief — I
[11] mean you say did they know.

[12] Q: I'm trying to find out which question you
[13] are answering.

[14] A: I'm answering the question did the FCC know
[15] the business would dry up.

[16] Q: Yes.

[17] A: And the answer was there was a very strong
[18] belief. One cannot know the future but consistent
[19] with that, they had a very strong belief that it
[20] would dry up, yes.

[21] Q: And in what period, generally, what period
[22] was contemplated?

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[1] MR. BENNETT: Form objection.

[2] THE WITNESS: I don't know if it was a
[3] specific period, but I said I think it is fair to say
[4] that people would have thought it would have even
[5] gone away earlier than it did, probably 10 to 15
[6] years.

[7] BY MR. TILLERY:

[8] Q: 10 to 15 years.

[9] A: Yes.

[10] Q: It is still going on, isn't it?

[11] A: I understand.

[12] Q: 10 to 15 years would take it through 1994
[13] through 1999. Is that what you thought at the time?

[14] A: Well, 1984 through 1999. I think that was
[15] the — that in terms of stopping existing at all,
[16] yes, I mean I think there was an understanding
[17] that — that some people were going to make
[18] economically irrational decisions to continue leasing
[19] but I think it is fair to say that as with other
[20] cases, the FCC underestimated the degree of economic
[21] irrationality that afflicts people making choices
[22] about communications.

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[1] Q: Well, what I am trying to find out is are
[2] you telling me that the FCC thought this CPE lease
[3] business was going to go on for 10 to 15 years?

[4] A: With some people, yes, with a few people.

[5] Q: Well, but I mean — let's say where 75
[6] percent of the base was gone. How long —

[7] A: So that the last 25 percent?

[8] Q: Yes. I mean how long was it contemplated
[9] that this — that three-quarters of this lease
[10] business would have dried up?

[11] A: I can't give you a specific answer to that
[12] but probably three-quarters. I — I just don't
[13] know. Less than 15 years, yes, I mean I think the
[14] three-quarters part of it.

[15] Q: Do you have any estimate at all?

[16] A: It — once again, it depends from where you
[17] gauge it. If you gauge it from the point at which
[18] the FCC started the deregulatory process, not just
[19] from the date on which the final deregulation took
[20] place, from the date on which they required
[21] unbundling and strongly urged, partly by using
[22] separations techniques, states to adopt their own

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[1] sales plans, if one looks at it from when that was
[2] started, I think people probably would have — a good
[3] guess would have been to be over by '90, '92. But
[4] that would be 75 down to 25 percent of the original
[5] number it had been when it was all offered on a
[6] bundled tariff basis.

[7] Q: When did that number get reached in
[8] actuality?

[9] A: Gee, I don't know. I don't know. That's
[10] something — I mean here you can see that I am more
[11] geek. That is something I would be more interested
[12] in looking up rapidly. I think — I just don't know.

[13] Q: You say that your position is that 99
[14] percent of leased phones have been replaced by
[15] purchased phones. That's what you said in your
[16] report?

[17] A: From the original ones by now, yes.

[18] Q: From what original number are you talking
[19] about?

[20] A: From the number that were offered when they
[21] were all bundled and —

[22] Q: How many numbers were there — what was

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[1] that number?

[2] A: Gee, if I had to make a guess, I would
[3] guess 130 million, 140 million.

[4] Q: And what year?

[5] A: Probably around 1978 or so, '77, '78.

[6] Maybe — maybe more than that. Maybe closer to 200
[7] million, if I look at the total number of instruments
[8] out there.

[9] Q: Are you aware of any instances in which the
[10] FCC concluded when the issue was specifically
[11] addressed to them that the sales market is the same
[12] as the lease market?

[13] MR. BENNETT: Object to the form of the
[14] question.

[15] THE WITNESS: For residential CPE?

[16] BY MR. TILLERY:

[17] Q: Right.

[18] A: No. I'm trying to remember when. I
[19] believe that they did that in the Computer II
[20] decision itself. We don't have the — the order, I
[21] haven't been able to — to find that or some of the
[22] additional recons but the — at that point, I don't

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[1] believe it was directly put to them. I think that
[2] was part of what they were determining in deciding
[3] why they found the market to be competitive, given
[4] the fact that at that point there was a single
[5] supplier of leased CPEs, tariffed CPEs in each
[6] market. The FCC's finding that it was competitive
[7] was not based — couldn't have been based and was not
[8] based on the fact that it was a separate market that
[9] had only a single supplier.

[10] Q: What was the number of AT&T lease customers
[11] on January 1, '84, do you know?

[12] A: January 1, '84?

[13] Q: Right.

[14] A: I'm not sure. I have seen it here. I
[15] don't recall. I — if I had to make a guess, I would
[16] guess around 85, 90 million but I'm not sure, in
[17] terms of instruments. When you say customers, that
[18] would be the number of instruments. I don't know if
[19] I have seen the number of accounts.

[20] Q: How many on January 1, '86?

[21] A: I'm not certain but I believe by January 1,
[22] '86, about 35, somewhere, 35, 40, 45 percent of them

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[1] want to go off for a few minutes, that's fine. If it
[2] goes on too long, then — I want you to have as much
[3] time as you need here but we can go off the record if
[4] that's what you want to do.

[5] MR. TILLERY: All right.

[6] MR. KING: Off the record at 4:23.

[7] (Discussion off the record.)

[8] MR. KING: We are back on the record at
[9] 4:30.

BY MR. TILLERY:

[10] Q: All right, sir. Have you, in the break
[11] where you have gone through the file trying to answer
[12] my question, have you identified any document or any
[13] support for your belief that the FCC found that there
[14] was a single market for residential CPE which
[15] includes both sale and lease?

[16] A: The quote that's in my testimony itself
[17] that you referred to is one of them. I know there is
[18] another one, which may be — we can't find some of
[19] the document. It may be in there but —

[20] Q: The only one you can think of is the one
[21] that I referenced and pointed you to?

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[1] A: That's the only one, yes, that I can point
[2] to now.

[3] Q: Okay. And while we are on the topic —

[4] A: Yes.

[5] Q: — while you were going through the
[6] documents, you found something that answered a prior
[7] question, you told me off the record. Would you
[8] identify what that is?

[9] A: Yes, and it is a part of the so-called CCIA
[10] decision, which was the decision by the court of
[11] appeals upholding the Commission's Computer II
[12] orders, and this was part of what I was referring to
[13] earlier about the form of preemption and it says,
[14] "The Commission did not in a tentative decision
[15] explicitly state that preemption of state regulation
[16] was under consideration. Such a statement was not
[17] necessary for preemption of any inconsistent state
[18] regulation — state regulatory scheme would follow
[19] automatically under the supremacy clause and other
[20] principles discussed above." In any event,
[21] preemption was explicit in the final decision. So
[22] part of what we were discussing was whether there was

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[1] any explicit preemption —

[2] Q: May I see that document that you are
[3] referencing?

[4] A: Yes, sir. It's — let me give you the
[5] whole thing.

[6] Q: Is this the only decision in the review of
[7] this FCC decision relevant to this case or were there
[8] other reviews?

[9] A: I believe that's the only — the only court
[10] appeal of the FCC decision?

[11] Q: Correct.

[12] A: I believe that's the only one.

[13] Q: And this is 693 F 2d 198 and it is a 1982
[14] opinion and it is — the part you were reading from
[15] was at page 217 for the record?

[16] A: Yes, I believe so. You have the order.

[17] Q: That was the review of the October 1982
[18] order — I'm sorry — October 1981 order?

[19] A: I think it was the October 1980 order.
[20] There may have been a further recon — there may have
[21] been — I mean it was a review of the Commission's
[22] Computer II line of orders and one of the things that

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[1] happens is that on minor points, the Commission would
[2] have a significant number of recons and depending on
[3] when they happened, the fact that an appeal was
[4] pending before the court of appeals wouldn't stop
[5] those, but the — but, basically, that is referring
[6] to the October 1980 order, the first recon order of
[7] the Computer II decision.

[8] Q: Now, you are familiar with that order,
[9] aren't you, and the language of that order?

[10] A: Generally, yes.

[11] Q: Okay. And you know that — actually, it
[12] was attached as Exhibit Number 2 to your report —

[13] A: As an exhibit.

[14] Q: — wasn't it?

[15] A: Yes, sir. It was attached as an exhibit.

[16] Q: All right. Tell me what was meant, then,
[17] in that order at 541, 542, paragraph 85. Can you
[18] identify that?

[19] A: You had that order a minute ago.

[20] Q: Why don't you give it to — it is 88 FCC 2d
[21] at 541, 542.

[22] A: This is the October '80 order we are

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[1] talking about, I think, the recon. Is this it here?
[2] MR. BENNETT: Yes.
[3] THE WITNESS: Paragraph 85.
[4] BY MR. TILLERY:
[5] Q: Is this 88 FCC 2d at 541?
[6] A: No. This is 88 FCC 2d at 50.
[7] MR. BENNETT: 84 FCC 2d.
[8] BY MR. TILLERY:
[9] Q: I'm looking at the one at 88 FCC 2d at
[10] 541-542. Do you have that?
[11] A: Yes.
[12] Q: Look at paragraph 85. Do you have
[13] paragraph 85?
[14] A: I'm getting there. Yes.
[15] Q: Do you see the part where it says, "Our
[16] objective is not to preempt all state regulation of
[17] the practices of those who provide CPE?"
[18] A: Paragraph 85.
[19] Q: Uh-huh. What I am reading, this is
[20] paragraph 85.
[21] A: Not — no. It does not seem to be in the
[22] copy of — of 88 FCC 2d 512?

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[1] Q: 541-542.
[2] A: Is the cite of the order or at page 5 —
[3] yes, this looks like it is at page 542.
[4] Q: 541 through 542, paragraph 85.
[5] A: Yes. Now, what does it say?
[6] Q: If a state regulatory authority —
[7] A: You mean take action so long as it does not
[8] conflict with our own policies, yes.
[9] Q: Right. "A state regulatory authority
[10] focussing on the local activities of the carrier,
[11] engaged in the provision of CPE, perceives some
[12] potential for abuse, it may take action so long as it
[13] does not conflict with our own policies."
[14] A: Right. Yes.
[15] Q: What does that mean to you?
[16] A: Well, if you look at the earlier sentence,
[17] it, basically, says it is — "The guiding principle
[18] is that we will not permit the carriers to engage in
[19] anticompetitive conduct," and it then goes on to say
[20] a state that wants to prevent this in a manner not
[21] inconsistent with what we have done is free to do so.
[22] Q: Is there any other basis you have found

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[1] that the FCC — strike that.
[2] Is there any other basis for your statement
[3] and opinion that the FCC found that there was a
[4] single market for residential CPE which included both
[5] CPE sale and lease, any documentary support?
[6] A: I did not find it. I will continue to
[7] look. Let me just say, having read through this full
[8] paragraph —
[9] Q: Yes.
[10] A: — is they are specifically talking here
[11] about actions that the state can take to prevent CPE
[12] pricing from being too low. They use two examples
[13] and this is the cross-subsidization they are talking
[14] about here. And the reason is that's not what they
[15] were worried about the states doing. The basic
[16] problem here is that they were worried about states
[17] wanting to make sure that the prices were too low. A
[18] state that now — and there were a few states, at the
[19] time this was done, there were one or two that were,
[20] in fact, procompetitive and wanted to — to protect
[21] competition rather than subsidizing rate payers and
[22] they are saying those are the examples they are

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[1] talking about here and the first sentence says that's
[2] what a state can do.
[3] Q: Could you tell me all the companies which
[4] have leased or continue to lease CPE in competition
[5] with AT&T and Lucent?
[6] A: I'm sorry. This is — is this the same
[7] question you asked before or a different one?
[8] Q: Is it — do you know of any company that's
[9] leased in competition?
[10] A: If this is the same one you asked before, I
[11] said no — nobody has entered the leasing market, the
[12] CPE market through leasing, that the entry — there
[13] has been a lot of new entry in the CPE market, as
[14] well as existing entry, is through sales and not
[15] leasing and that I don't know of anybody who either
[16] was present at the time or who was a new entrant into
[17] the CPE market through a leasing strategy. I'm
[18] sorry. I'm trying to answer. That was — that's the
[19] same thing you asked before. Did I get — I tried to
[20] give the same answer and I'm not sure if it was a
[21] different question.
[22] Q: Well, really, what I was trying to find out

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[1] have been significant issues involved in price —
[2] what I call tacit price coordination, so markets that
[3] the FCC believes are competitive appear to exhibit
[4] similar abilities to raise prices at will but, yes, I
[5] mean with that caveat, I think that is, in fact, a —
[6] an indication of lack of competitiveness.
[7] Q: Anything else?
[8] A: Well, the thing that I just mentioned,
[9] which is coordinated price increases, insofar as
[10] every supplier in the market raises prices in tandem,
[11] that is a significant indicator of lack of
[12] competition in the market.
[13] Q: How do businesses determine price in a
[14] competitive marketplace?
[15] A: They charge — they put — they do research
[16] or whatever and the basic answer is you charge the
[17] profit maximizing amount.
[18] Q: What does that mean?
[19] A: That means that — that you — I mean the
[20] tautological definition is you come up with a price
[21] that at the bottom line means your shareholders do
[22] the best and that's the price at which the number of

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[1] units you sell, the amount of revenue you get, which
[2] is the per unit price times the number of units,
[3] minus the number of costs, in many cases, not all,
[4] and not in telecommunications, but there are some
[5] additional costs that you get by selling additional
[6] units but which price you can charge at the bottom
[7] line produces the biggest profit.
[8] Q: Well —
[9] A: The thing that's —
[10] Q: If you don't mind me interrupting for a
[11] second.
[12] A: No.
[13] Q: Under that theory, though, why wouldn't —
[14] why would there be any ceiling on what you could
[15] charge?
[16] A: Oh, the reason is quite simple. If I
[17] charge a million dollars for —
[18] Q: Right, for a 100 — for a \$100 item.
[19] A: Yes, then very few — enough fewer people
[20] will buy it than will buy it at \$100.
[21] Q: Actually, with that such a preposterous
[22] example as I have given you, wouldn't the guy go down

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[1] the street and buy it from your competitor? You
[2] would never have a customer.
[3] A: Well, that's what I just — that's what I
[4] just said.
[5] Q: Right.
[6] A: At a million dollars, you would sell
[7] sufficiently fewer units than you would sell at \$100,
[8] such that your total profits would be lower.
[9] Q: You say successful fewer. In the extreme
[10] example I have given, nobody would ever buy any of
[11] your equipment. You would never pay a million
[12] dollars for a \$100 item.
[13] A: No. But if it is a super computer, you
[14] might charge a million dollars for something somebody
[15] else is selling for \$650,000 and you have a better —
[16] I'm not sure for what — if you are talking about a
[17] piece of residential CPE, no, nobody would ever
[18] charge a million dollars for it.
[19] Q: Here's what I am getting at. In a
[20] competitive marketplace — strike that.
[21] What's a competitive marketplace? Define
[22] it.

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[1] A: It is a marketplace in which there are
[2] multiple suppliers able to meet capacity, enough that
[3] consumers out there — and the FCC always dealt with
[4] the public interest, of whom consumers were a
[5] significant part, had sufficient choices to make such
[6] that the FCC need not intervene and set the price
[7] because they deemed, certainly when I was there and I
[8] believe continually since then, for there to be
[9] significant societal costs from price regulation.
[10] Q: After January 1, '84, was there a
[11] competitive marketplace for those people, embedded
[12] base customers, who wanted to continue to lease
[13] phones?
[14] A: Well, there is no — that is not a correct
[15] definition of a market. The reason for that is
[16] that's like saying —
[17] Q: Can you answer my question?
[18] MR. BENNETT: I think he is.
[19] THE WITNESS: I'm trying. The question you
[20] have asked is is there a competitive market for
[21] people who insist upon drinking Pete's espresso
[22] coffee. If you define something in a way that says

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[1] is there a competitive market for somebody who wants
[2] to stick with one of a number of substitutable items,
[3] that's not a fair question.

[4] BY MR. TILLERY:

[5] Q: Actually, there is a competitive
[6] marketplace. I went down at lunchtime and in terms
[7] of espresso coffee, from the corner down here, I
[8] could see three different coffee shops and I went to
[9] lunch at one of them. Now, I had a choice. Now,
[10] what my question to you is, sir, after January 1,
[11] 1984, okay, was there a competitive marketplace for
[12] those phone lease customers who chose to continue to
[13] lease?

[14] A: All right. I'm going to try this again.
[15] The answer to that is yes and the reason for that is
[16] the fact that somebody wants to insist on one of a
[17] number of substitutable goods and products doesn't
[18] start a marketplace from being competitive. You are
[19] right. There were three there. But if you said, "I
[20] don't care how much they charge, I am going to — to
[21] drink at this one and I don't want to look at the
[22] others, I insist on this," even though the others

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[1] were substitutable. So the answer is the
[2] competitive — the CPE marketplace was fully
[3] competitive for anybody. If somebody wanted to
[4] insist —

[5] Q: How is it competitive for somebody who
[6] wanted to lease a phone, who chose to lease a phone?

[7] A: Because the marketplace that the FCC found
[8] explicitly did not recognize a choice to lease a
[9] phone as constituting the type of choice that
[10] deserved protection when that person had a full
[11] opportunity to purchase and substitute a phone, that
[12] the ability to purchase and substitute a phone made
[13] the CPE marketplace, and the FCC said, and it was
[14] upheld, and the court, in upholding it, said the
[15] reason, you know, the FCC said they are doing is
[16] because they find sold— leased— sold CPE in the
[17] same marketplace.

[18] Q: Is there any FCC document, sir, that the
[19] phone lease market was the same as the phone sale
[20] market? Where did it say that?

[21] (Pause.)

[22] Is this going to be a while, sir, or can

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[1] you get your hands on this right away?

[2] A: I'm — I'm not sure. As I say, it is — I
[3] know it says that explicitly in one of the Computer
[4] II orders and I just have to go through it and find
[5] it.

[6] Q: Well, I can direct you to what you have
[7] found, if you want me to help you here.

[8] A: Okay. Sure.

[9] Q: I will be happy to help you.

[10] A: I'm not trying to — I'm not trying to —

[11] Q: Why don't you look on page 7 of your report
[12] and it will give you the reference and this quote
[13] says, and your quote, is, "Further, we return to our
[14] earlier conclusion that the competitive marketplace
[15] offers ready relief to those residential users who
[16] may not wish to continue leasing equipment from
[17] ATTIS." Is that your answer?

[18] A: That's not the only one. I know it says
[19] here —

[20] Q: Give me the others.

[21] A: — for example — all right.

[22] Q: I'm just trying to speed things along.

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[1] A: No, I — I understand. Once again, it is
[2] making reference here to return to our earlier
[3] conclusion in the — this is — that's the
[4] implementation docket, not the Computer II itself,
[5] which is what I am looking for.

[6] Q: So what I read does not answer the
[7] question?

[8] A: It does, in part.

[9] MR. TILLERY: We are going to go off the
[10] record if this is going to be a few minutes.

[11] MR. BENNETT: Well, you want him to look
[12] through everything to find everything that he can
[13] possibly do.

[14] MR. TILLERY: These are key items
[15] supporting his opinions and I sure do want to find
[16] them.

[17] MR. BENNETT: I mean I think that shouldn't
[18] count against our time — I mean that should count
[19] against your time.

[20] MR. TILLERY: I mean — well, I mean we can
[21] sit here and look all day long but I mean if it is —

[22] MR. BENNETT: That's fine, Steve. If you

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[1] substitutable product?

[2] A: Yes.

[3] Q: Do you believe there is any —

[4] A: With adequate supply. So long as they are
[5] competitors able to meet demands. I mean I — I just
[6] want to respond. It is possible that there is a
[7] marketplace in which there are five entrants, four of
[8] whom have the capacity to serve 5 percent of the
[9] market and where there are significant capital or
[10] other barriers to entry that would prevent new
[11] entrants from coming in or prevent them from
[12] expanding, in which case, even though people can —
[13] are serving the market, there still, for most people,
[14] is not a sufficient capacity to provide them with
[15] substitute products.

[16] Q: From 1984 on, did AT&T have any competitors
[17] in the telephone leasing business who leased
[18] telephones to their embedded base customers?

[19] A: I — to their customers?

[20] Q: Yes.

[21] A: To AT&T.

[22] Q: In the same market area. In their own

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[1] customers?

[2] A: No, nobody ever entered did CPE marketplace
[3] through a lease strategy. It was clearly the type of
[4] thing that the FCC knew would not happen and I think
[5] all of the predictions were quite correct. I mean
[6] the FCC said very clearly, once again, that there was
[7] not a CPE lease marketplace. They based the Computer
[8] II decision on the fact that sold CPE was part of the
[9] same market as leased CPE in the residential area,
[10] especially, it was somewhat more complex in the
[11] multi-line business market but in the residential
[12] market, they defined a CPE — they found a CPE
[13] market, not a lease CPE market.

[14] Q: Let's go back to my question.

[15] A: Sure.

[16] Q: All right? Just so we are clear on the
[17] record, from 1984 on, did AT&T have a competitor
[18] offering residential leasing customers alternatives
[19] with respect to leases, phone leases?

[20] MR. BENNETT: I object to the form of that
[21] question. It is different than the question that you
[22] asked previously and I think it is vague and

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[1] ambiguous.

BY MR. TILLERY:

[2] Q: Can you understand my question?

[3] A: I think so. No, that no one — no

[4] competitor ever entered the CPE market by offering
[5] CPE leases to residential customers. Right? We are
[6] separating out here. I understand that's the subject
[7] of this. We are not talking about —

[8] Q: I'm just trying to get a clear answer on
[9] the record.

[10] A: We not talking about business, just
[11] residential.

[12] Q: Nobody ever went in and started competing
[13] by leasing phones to AT&T's customers?

[14] A: That is correct.

[15] Q: All right. Did the FCC contemplate that
[16] the phone lease business was drying up?

[17] A: Yes. The FCC believed that — that phone
[18] leasing was a business that would be reduced
[19] substantially. They didn't know the precise pace but
[20] they expected it to go away and I think to be fair,
[21] the FCC felt like it had to — to permit the lease
[22]

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[1] business to continue for a significant period of time
[2] because of political pressures —

[3] Q: What political pressures?

[4] A: — but questioned the economics.

[5] Q: What political pressures?

[6] A: The political pressures from Congressmen
[7] who were desperate to avoid any further disruption of
[8] consumers at the time of divestiture.

[9] Q: Because of the confusion?

[10] A: Because of the confusion and also because
[11] there was a belief, a sincere belief on the part of
[12] some Congressmen, that competitive CPE sales would
[13] not be widely available on a geographically
[14] ubiquitous basis.

[15] Q: Your Upper Peninsula person?

[16] A: UPP. Yes. That was the classic example.

[17] One of the reasons we were so sensitive to that is
[18] that —

[19] MR. TILLERY: What's wrong?

[20] MR. BENNETT: Nothing.

[21] THE WITNESS: I was saying one of the
[22] reasons we were so sensitive to the Upper Peninsula

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[1] person was the fact that Chairman Dingle paid a great
[2] deal of a attention to the FCC, and since he came
[3] from Michigan, we were quite sensitive to Michigan
[4] issues.

[5] MR. BENNETT: I didn't mean to distract
[6] you. I would like to take a minute here. We have
[7] been going about an hour and 15.

[8] MR. TILLERY: No problem. Sure.

[9] MR. KING: We are off the record at 4:05.

[10] (Recess.)

[11] MR. KING: We are back on the record at

[12] 3:09 — 4:09.

[13] BY MR. TILLERY:

[14] Q: Could you tell me what factors you look at
[15] to determine whether a given market is or is not
[16] competitive?

[17] A: For FCC purposes? I mean the FCC made
[18] those determinations.

[19] Q: In a general sense.

[20] A: The FCC, which did it, I mean that's what I
[21] know about best, because we had to make those
[22] determinations again and again and again. They still

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[1] make those determinations. It is one of the most
[2] important things and one of the most — one of the
[3] chief tasks of the FCC, to try and determine whether
[4] a market is actually competitive, which is not a yes
[5] or no, there are degrees of competitiveness. The FCC
[6] asks itself whether or not most consumers have a
[7] reasonable opportunity to purchase or lease or take,
[8] using one word for the two of them, services or
[9] equipment from different suppliers, whether or not
[10] there is adequate capacity, which is available or can
[11] rapidly be made available to meet existing and
[12] reasonably forecast consumer demand, whether or not
[13] there is easy entry and exit from the business and, I
[14] guess, to some extent they — they traditionally have
[15] looked at the question of whether or not — what the
[16] alternative is, what the consequences are of
[17] determining that a market is competitive to a certain
[18] degree and what the consequences are of making a
[19] different determination.

[20] Q: Is it possible for a single market to have
[21] isolated pockets which are not competitive?

[22] MR. BENNETT: I object to the form of the

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[1] question.

[2] THE WITNESS: I — I would say no, that if
[3] there are pockets which are not competitive, then
[4] they somehow should be defined as being a different
[5] market, that a market should be deemed to be
[6] competitive or not, that — whether it is on the
[7] basis of geography or some other determination, that
[8] those — that for some people, you are saying there
[9] is either restriction on entry or there is inadequate
[10] capacity or something.

[11] BY MR. TILLERY:

[12] Q: What are the signs that a market is not
[13] competitive?

[14] A: The signs a market are not competitive are
[15] no entry of new entrants, I —

[16] Q: No entry?

[17] A: No entry.

[18] Q: What do you mean by that?

[19] A: Nobody new coming in. No new suppliers
[20] coming in.

[21] Q: How does that tell you it is not
[22] competitive?

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[1] A: Because the types of signals that you have
[2] here is that if, in fact, a market is competitive,
[3] particularly in the communications field that we deal
[4] with, there are so many different potential
[5] competitors who are out there and who always want to
[6] move into adjacent markets, geographically or defined
[7] by service, that one of the things that we — we
[8] always saw were significant numbers of new entrants
[9] in the markets that we deemed to be competitive. We
[10] saw lots of people coming in. That was an important
[11] signal that showed there was competition.

[12] Q: So the absence of a market entrant would be
[13] one of the indicators of a lack of competition?

[14] A: Yes. If — if —

[15] Q: What else?

[16] A: — it was a fixed number.

[17] Q: What else?

[18] A: The very high prices.

[19] Q: The ability to charge or raise prices at
[20] will?

[21] A: That's a hard — the answer is yes, except
[22] that — that in the telecommunications field, there

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[1] answering machines and — I'm trying to think. I
[2] think in '82 they were just starting to do the first
[3] cruddy cordless phones up in 900, may have actually
[4] had some down way lower than that, as well, but there
[5] wasn't a specific crossover. You are saying why did
[6] I think I wouldn't have done it?
[7] Q: Right.
[8] A: Because every phone that I ever looked at,
[9] indeed, every piece of customer premises equipment I
[10] have looked at then or since, today, I had exactly
[11] the same phenomenon where I — I had to fight to — I
[12] didn't have to fight. It was much, much harder for
[13] me to stop leasing my CPE a couple months ago with,
[14] you know, not — with not AT&T, with another company,
[15] but the — I have never wanted to lease. I like to
[16] buy, I like to own it, I like to be able to jigger
[17] with it if I can.
[18] Q: From a purely financial standpoint — do
[19] you understand what I am getting at?
[20] A: Yes.
[21] Q: From a purely financial standpoint, would
[22] it make sense to continue leasing embedded base CPE

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[1] equipment?
[2] MR. BENNETT: Object to the form of the
[3] question. You are talking about from his
[4] perspective?
[5] MR. TILLERY: Absolutely.
[6] THE WITNESS: From a purely financial
[7] standpoint?
[8] BY MR. TILLERY:
[9] Q: Yes.
[10] A: I'm not — how does one value insurance?
[11] Q: I talking about you.
[12] A: I understand. Given my valuation of
[13] insurance and not being terribly risk givers, you are
[14] buying insurance as part of the price of leasing.
[15] Different people — I'm — I'll give you the answer,
[16] you know, but —
[17] Q: That's what I am looking for.
[18] A: Okay. And so you are asking me to give my
[19] evaluation of the value of insurance.
[20] Q: Purely economic standpoint, would it make
[21] sense to continue leasing?
[22] A: Every — every time I have faced the

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[1] choice, I have decided no, regardless of whether it
[2] was —
[3] Q: So the answer to my —
[4] A: — with any form of CPE.
[5] Q: The answer to my question, then, is —
[6] A: No.
[7] Q: All right. Do you claim expertise as an
[8] economist?
[9] A: I am not an economist. I have supervised
[10] many economists and I know a lot about regulatory
[11] economics.
[12] Q: Are you claiming expertise as an economist?
[13] A: As an economist?
[14] Q: Yes.
[15] A: I am not an economist, no.
[16] Q: Do you claim expertise in the field of
[17] economics?
[18] A: Regulatory economics, yes.
[19] Q: Regulatory economics? What is that?
[20] A: It is the economics of regulated companies
[21] and it was probably popularized by Fred Kahn, who
[22] wrote the textbooks on regulatory economics, and it

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[1] recognizes that firms operating under regulation have
[2] significantly different sets of incentives and
[3] operate in significantly different ways than do
[4] unregulated firms in the marketplace.
[5] Q: So I should feeling free in this deposition
[6] and at trial to ask you any questions about
[7] regulatory economics, right, because you are an
[8] expert in that field?
[9] A: Yes. I said do you claim expertise and the
[10] answer is yes, I have some expertise in that.
[11] Q: You are an expert in that field?
[12] A: Yes, I have expertise in that field.
[13] Q: Okay. Are you claiming expertise in the
[14] area of antitrust law?
[15] A: No, I'm not an antitrust lawyer.
[16] Q: Any other areas where you claim expertise
[17] in — let me rephrase the question. Any other areas
[18] of expertise that you claim that have some
[19] application to this lawsuit?
[20] A: Besides regulation, regulatory economics,
[21] the specifics of the FCC, FCC practices procedures,
[22] the circumstances involving CPE deregulation and CPE

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[1] market generally.

[2] Q: Actually, you have sort of told me those
[3] areas generally, haven't you?

[4] A: I think so. I'm just trying to —

[5] Q: I'm asking if there is anything new,
[6] anything you haven't told me.

[7] A: That's covered in my — my testimony. I
[8] mean I'm — I consider myself an expert in other
[9] matters so I don't —

[10] Q: I mean things that we may be hearing about
[11] at the trial is what I am getting at where you have
[12] opinions.

[13] A: I — I'm not sure of that. Let me say that
[14] I — while I am not an accountant, I have also
[15] supervised lots of accountants, and among other
[16] things, I was chiefly responsible for the — at the
[17] staff level for — I was the chief attorney dealing
[18] with the — with the rewrite of the uniform system of
[19] accounts and there seem to be some issues here
[20] involving — that are on the intersection. I don't
[21] know whether they would be considered regulatory or
[22] economics or accounting.

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[1] Q: Are you offering opinions about accounting
[2] in this case? If you have, I haven't seen them in
[3] your report.

[4] A: To the extent to which things like some of
[5] my comments about Democratic Central Committee are
[6] deemed to be only an area of regulatory law and not
[7] accounting, or some — I — if it is not in there,
[8] the answer is no. I mean I —

[9] Q: If it is not in your report?

[10] A: If it is not in my report, another area,
[11] no. Some of what's in my report could probably be
[12] characterized as being in a number of different
[13] fields or different people might characterize it as
[14] being in different fields and that's the — what I
[15] was thinking about.

[16] Q: How do you define a market, sir?

[17] A: A market is a combination of product and
[18] geography in which people can substitute one good or
[19] service for another.

[20] Q: How do you define "product market"?

[21] A: A product market is — without regard to
[22] geography, is the set of products which are

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[1] substitutable for each other, reasonably

[2] substitutable for each other.

[3] Q: Tell me the things that you must look at to
[4] determine whether a single market or multiple markets
[5] exist for any given product.

[6] A: Well, it depends why you are trying to
[7] determine that. The FCC, in fact, specifically
[8] looked in — a great many times about whether or not
[9] a market existed for purposes of deciding what type
[10] of regulation to apply to it and what they would look
[11] to to determine whether or not it was one market or
[12] many markets was primarily consumer behavior and to a
[13] somewhat lesser extent firm behavior. From a
[14] consumer behavior perspective, they looked to see
[15] whether or not people, in fact, moved and were able
[16] to move from one product or service to another.
[17] There was a considerable amount of discussion about
[18] whether or not — about how potential entry by
[19] entrants, the products they might offer, should be
[20] deemed for purposes of those market determinations.
[21] I think it is fair to say that was never fully
[22] resolved. With respect to geography, it was sort of —

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[1] like what you said before, almost a case-by-case
[2] basis. What the FCC did in determining what it would
[3] treat as a marketplace was look to the public
[4] interest standard that was set forth for it and to
[5] make a determination about what type of market
[6] definition it believed would most promote the public
[7] interest.

[8] Q: What is market power, sir?

[9] A: Market power is the ability to raise and
[10] maintain a price above the market level for a
[11] significant period of time.

[12] Q: What's a significant period of time in your
[13] answer? More than a year?

[14] A: That — that's fair. On something other
[15] than a transitory basis. One can raise it and
[16] maintain it. The question is what does the word
[17] "maintain" mean there. I don't know if it is a
[18] single answer but I think that's a fair
[19] characterization.

[20] Q: Is it your view that a company cannot have
[21] market power with respect to a particular product so
[22] long as there are competitors offering a sub — a

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[1] Q: When was that?
[2] A: It would have been 1988.
[3] Q: You leased a phone from whom in 1988?
[4] A: It would have been United, United
[5] Telephone.
[6] Q: What kind of phone did you lease?
[7] A: It was a wall phone.
[8] Q: And was it hard wire?
[9] A: Yes, it was.
[10] Q: How long did you lease it?
[11] A: Two months, three months.
[12] Q: Did you make a voluntary choice of leasing,
[13] as opposed to buying a phone?
[14] A: Yes.
[15] Q: You wanted to lease?
[16] A: For a short period of time.
[17] Q: Why?
[18] A: Because it was there and I didn't want to
[19] have the hassle of changing it right away.
[20] Q: Okay. Did you ever lease before that?
[21] A: I —
[22] Q: Or since?

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[1] A: I'm not sure what you mean by lease. I
[2] took phones under tariff, you know, throughout my
[3] adult life, any time I was living somewhere, which
[4] is — I would describe as somewhat different than a
[5] lease, although I think it is called a lease in some
[6] of the — in the pleadings here. I mean it
[7] is referred to interchangeably so — are you
[8] including taking under tariff?
[9] Q: When did you do this, take it under tariff?
[10] A: Gee, I — probably for the first time in
[11] 1964, just with phone service.
[12] Q: Because it was bundled with your phone
[13] service, right?
[14] A: In Michigan, yes.
[15] Q: Did you have a choice at that time of
[16] whether or not you paid for that phone lease through
[17] tariff service in a bundled rate?
[18] A: As I say, I don't — I'm happy to answer.
[19] I'm not trying — I don't think it is the lease. It
[20] is not a lease in that circumstance.
[21] Q: It is not?
[22] A: No. It is not covered by any type of

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[1] agreement between a lessor and a lessee.
[2] Q: Was it a gift to you?
[3] A: It is a tariff offering. No.
[4] Q: Was it a service gift?
[5] A: It was a tariff offering. A lease, to my
[6] understanding, as I say, I'm not trying —
[7] Q: What is a lease, by the way?
[8] A: It is an agreement between a lessor and a
[9] lessee to provide a good for a fixed or indefinite
[10] period of time for payment.
[11] Q: For an indefinite period of time?
[12] A: For a fixed or indefinite period of time.
[13] Q: Okay. Did you then ever lease a phone
[14] other than this two-month period of time?
[15] A: Where I made an agreement with someone?
[16] Q: Right.
[17] A: Yes. I — well, it depends what you mean
[18] by a phone and I'm — the reason I say this is that
[19] there was a period of time at which AT&T, the Bell
[20] system, prior to divestiture, would sell you a
[21] plastic shell, you go into a store and purchase the
[22] outside of the phone but the inside of the phone

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[1] could not be purchased at that time and was provided
[2] by lease. So any of the phones that you got, I
[3] actually got a Mickey Mouse phone, I recall, I was
[4] actually buying the shell part of it but not the
[5] workings.
[6] Q: When was this?
[7] A: I would guess around '78, '79. I'm —
[8] Q: Were you paying a separate phone lease bill
[9] then?
[10] A: Yes.
[11] Q: To whom?
[12] A: To — I think then it would have been to
[13] C&P.
[14] Q: Who is C&P?
[15] A: Chesapeake & Potomac is the telephone
[16] company that serviced still major portions of
[17] Virginia where I was located.
[18] Q: So you were leasing the phone at that time?
[19] A: Once again, subject — I mean I'm —
[20] subject to the fact that I was paying for it under
[21] tariff, it looked a lot like — I was paying a
[22] recurring monthly charge for it.

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[1] Q: Okay. How much were you paying?
[2] A: I don't recall.
[3] Q: How many phones were you leasing? If we
[4] are calling that a lease, a tariff payment, let's
[5] call it that.
[6] A: I don't mind doing that.
[7] Q: As long as we understand each other?
[8] A: Yes.
[9] Q: If we are calling that a lease, how long
[10] did you lease under those conditions?
[11] A: I'm not sure. I would guess three, four
[12] years.
[13] Q: When did you terminate it?
[14] A: If it was three or four years and I did it
[15] in '78, it would have been around '82.
[16] Q: So you had no leased phones in '82?
[17] A: I don't believe so, no.
[18] Q: You had discontinued them?
[19] A: Yes.
[20] Q: Why did you get the notice?
[21] A: I don't have — I don't have any idea at
[22] all except that the — I at the time may have been

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[1] carried still on a distribution list by AT&T which,
[2] you know, they occasionally had people they would
[3] send all of their major announcements to and things.
[4] I got, you know, telecommunications reports. I — I
[5] assume that's why.
[6] Q: Okay. Why did you quit leasing?
[7] A: I quit leasing because I wanted to own my
[8] own phones, pick out the ones I wanted, which were
[9] not being offered under lease.
[10] Q: You could do that — you could do that
[11] through the Bell Operating Companies, couldn't you?
[12] A: No, I could not.
[13] Q: Are you sure about that?
[14] A: I'm pretty sure.
[15] Q: So would you continue to lease — strike
[16] that.
[17] Would you have continued to lease if the
[18] service had been provided to you of being able to
[19] pick out your phones?
[20] A: If the particular phones I wanted?
[21] Q: Yes.
[22] A: I strongly doubt it. The answer is I'm

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[1] almost certain not.
[2] Q: Why?
[3] A: It is a hypothetical.
[4] Q: Why?
[5] A: Because I — I thought it was a bad
[6] economic trade-off.
[7] Q: Explain that to me. Why is that a bad
[8] economic trade-off?
[9] A: I — because I have never had any interest
[10] in the insurance component of a lease. I have
[11] always — even — I guess I'm under oath. Even when
[12] it has been prohibited —
[13] Q: You have been since about 9:30 this
[14] morning.
[15] A: I understand. I understand. So let me say
[16] that even when it has been prohibited under tariff, I
[17] have jiggered with phones myself. When I was chief
[18] of the Common Carrier Bureau, I actually brought in
[19] my own instrument because I didn't like the leased
[20] ones that were provided by the Bell system to the
[21] FCC.
[22] Q: Why? Why?

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[1] A: Because I couldn't get the one I wanted.
[2] Q: Why didn't you like the leased ones? Color
[3] wrong?
[4] A: No, it didn't have speakerphone.
[5] Q: Okay. Speaker?
[6] A: And it was rotary dial. As was well-known,
[7] the FCC — I mean one of the things that I made — I
[8] didn't successfully complete, it was my successor who
[9] did, was trying to get touch tone phones for the
[10] FCC. So I — it wasn't a phone I wanted. But the —
[11] so I — to get back to your original question, I mean
[12] I have always been interested in it, I mean I have
[13] done it professionally for a while, you know, I'm not
[14] an engineer but — you know, I like electronics, I
[15] play around with things like that, so I had no
[16] interest in the type of security you will get from
[17] being able to replace it or had them repair it or
[18] anything like that, and if I looked at this as
[19] whether or not I would rather pay a certain amount of
[20] money for it, once get it over and done with, or
[21] pay — I do not remember what — you know, I mean I
[22] guess there is no way to know. I had phones with

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[1] probably been in — if I had to make a guess, I
[2] probably developed it sometime in late '82.
[3] Q: And as — when the piece came to your house
[4] in December of 1983 and you saw it for the very first
[5] time, was it the type of piece that you contemplated
[6] when you worked at the FCC as a notice?
[7] A: I don't remember my personal reaction. I
[8] can't answer that. I do not know. I do not recall.
[9] Q: And your testimony is today that that
[10] wasn't primarily a marketing piece?
[11] A: That's correct. It was primarily a request
[12] for customers, a direction to customers to make a
[13] choice about what to happen.
[14] Q: So anybody referring to that as a marketing
[15] piece would be in error, certainly, in your opinion;
[16] right?
[17] A: I — you asked me what it primarily was. I
[18] mean AT&T was mandated.
[19] MR. BENNETT: I want to object to the form
[20] of the question but you can go ahead and answer.
[21] THE WITNESS: AT&T was mandated to spend
[22] millions of dollars for that and other advertising

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[1] campaigns to inform people, and that was the
[2] obligation, of the changes that were taking place and
[3] to tell them they had to make a choice with respect
[4] to that CPE about buying it or leasing it. They were
[5] not prohibited, given the fact they are spending all
[6] this money, from adding marketing to it. If there
[7] was somebody at AT&T who thought the primary purpose
[8] of it was a marketing piece, you know, all — all I
[9] can tell you is that there was no circumstance in
[10] which AT&T could have decided it wasn't really
[11] interested in doing marketing so it wasn't going to
[12] send it out. That was a nonvoluntary mandated action
[13] and I don't think a nonvoluntary — a nonvoluntary
[14] mandated action by the FCC can be described as
[15] primarily a marketing attempt.
[16] BY MR. TILLERY:
[17] Q: When — I'm confused by these nonvoluntary
[18] mandated actions that you talk about.
[19] A: Yes.
[20] Q: Was the \$12 million they spent something
[21] you came up with, too? You know their \$12 million
[22] budget on advertising?

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[1] A: Gee, I thought it was significantly greater
[2] than that. I have to — to go back and look at the
[3] detail.
[4] Q: Well, give me a number. What is it? 100
[5] million?
[6] A: No, I — I guess about 50, 60.
[7] Q: Sixty, then. Let's say 60. The 60 million
[8] they did on advertising, was that something you came
[9] up with, too, that they should do?
[10] A: That they would have to do some. The
[11] specific — the specific number was not done at a
[12] final level in terms of what the plan was.
[13] Q: And are you telling me today that that was
[14] initially your thought?
[15] A: That there would have to be significant
[16] advertising?
[17] Q: Yes. Was that your idea?
[18] A: I don't remember that it personally was
[19] mine. It was the FCC's. It was part of the basic —
[20] Q: Was that a mandated action?
[21] A: That — the answer is yes, it was.
[22] Q: Okay. And is it your testimony that AT&T

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[1] didn't come up with that idea first?
[2] A: I can't say they didn't come up with it
[3] independently, I can tell you that prior to —
[4] Q: That's my question. Did they or did they
[5] not come up with that idea first and then come to the
[6] FCC with the idea of saying, "Hey, we would like to
[7] do some advertising"? Which way did it happen?
[8] A: Well, the answer is I can't say whether
[9] they came up with it first because —
[10] Q: That's my question.
[11] A: The reason I can't is I just said I don't
[12] know independent — if they came up with it
[13] independently, I don't have any idea of the timing
[14] about who came up with it first. If we came up with
[15] it independently, we came up with that and required
[16] them and told them they were going to have to do it.
[17] Now, if —
[18] Q: This mandated stuff is what's confusing
[19] me.
[20] A: Let me just finish the sentence. As I
[21] tried to say, if they independently said, "We are
[22] going to do it whether we are required to or not," I

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[1] can't say they did or didn't. I don't know and I
[2] have no idea who came up with it first. The way the
[3] requirements were structured is we negotiated with
[4] them and said what was going to have to be in the
[5] plan they submitted for approval. They voluntarily
[6] submitted this plan for approval and the FCC issued
[7] an order mandating compliance with the plan. So it
[8] started being voluntary in that sense and changed
[9] into a legal requirement.
[10] Q: Whenever the order signed by the FCC?
[11] A: Yes.
[12] Q: Isn't that, basically, what happened in
[13] terms of developing the order regarding CPE? You
[14] went to — you went to — to AT&T and asked them to
[15] come up with a proposal.
[16] A: We certainly —
[17] Q: Isn't that what you did?
[18] A: We absolutely asked them to come up with a
[19] proposal. We simultaneously with that were
[20] discussing at — talked to everybody else and asked
[21] them what should be in such a proposal and then we
[22] engaged in significant discussions, I mean this is

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[1] exactly the same process I told you. We — AT&T was
[2] required to go out and submit a proposal, okay? We
[3] talked to them about what they wanted to be in that
[4] proposal. We talked to everybody else about what
[5] they wanted to be in that proposal. We then told
[6] AT&T what we expected to be in that proposal.
[7] Q: But AT&T came up with a proposal, didn't
[8] it?
[9] MR. BENNETT: I object to the form of the
[10] question.
[11] BY MR. TILLERY:
[12] Q: Right?
[13] A: What do you mean, "came up with"?
[14] MR. BENNETT: Misstates the prior
[15] testimony.
[16] BY MR. TILLERY:
[17] Q: Who drafted the proposal?
[18] A: Who drafted the proposal?
[19] Q: Yes.
[20] A: It was physically drafted by AT&T.
[21] Q: Right. Okay.
[22] A: I'm — as I said, we told them what they

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[1] had to physically draft and they physically drafted
[2] it.
[3] Q: There is no question on the table. You
[4] were asked some questions about mass media
[5] communications. You said there was a whole section,
[6] remember?
[7] A: Yes, bureau.
[8] Q: A whole bureau on this. Okay. What was
[9] the nature of — of their mass media expertise?
[10] A: They regulated all regulatable mass media
[11] under the Communications Act. There were engineers,
[12] lawyers, economists, policy people, I think those
[13] were the primary professional categories there.
[14] Q: Did they have any involvement at all in
[15] what you were doing in 1983?
[16] A: No. As I said — once —
[17] Q: Had nothing to do —
[18] A: To repeat the answer.
[19] Q: Had nothing to do with the AT&T matter, did
[20] it?
[21] A: No. The involvement that they had, as I
[22] said, was limited and I think I made clear, this was

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[1] a limited and only with respect to the head of the
[2] bureau at the senior staff level, being involved in
[3] high-level discussions about what should be done and
[4] what was going on, not at this staff level. I — I
[5] believe I testified to that earlier but — that is
[6] the case.
[7] Q: You know, in this case, I wanted to know if
[8] you could tell me what you considered your expertise
[9] to be that gives you a basis for offering opinions.
[10] A: I think my expertise is in
[11] telecommunications regulation generally. I think
[12] specifically I have an expertise in the detariffing
[13] of CPE, why it was done, how it was done, when it was
[14] done, a number of the intricacies about it and I
[15] would say that I have some expertise, as well, in the
[16] subsequent development of the CPE marketplace.
[17] Q: Did you ever lease a phone?
[18] A: Yes.
[19] Q: When?
[20] A: I leased a phone on a couple of occasions.
[21] I leased a phone for a brief period of time when I
[22] had a temporary apartment.

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[1] signed, sealed and delivered. Effectively, that's
[2] been the focus of your testimony all day. What good
[3] is it going to do to talk to them later?
[4] MR. BENNETT: I object to the question
[5] because it is compound. I also think it is
[6] argumentative and I also I think it mischaracterizes
[7] the prior testimony.

[8] BY MR. TILLERY:

[9] Q: What good is it going to do? Tell me.

[10] A: I will. The answer is that the
[11] negotiations had to do with the order which was at
[12] one level of specificity. Subsequent to that, there
[13] were considerable number of implementation details
[14] and it made lots of sense to look at different things
[15] and have different people with different expertise
[16] involved at looking at the implementation details who
[17] had nothing whatsoever to do with the negotiation of
[18] the order itself.

[19] Q: You don't think that it might have been
[20] helpful to have somebody whose primary interest it
[21] was to concern themselves with consumers and their
[22] rights involved in this negotiation?

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[1] MR. BENNETT: Foundation objection.

[2] THE WITNESS: No more than trying to come
[3] up with a single individual who sole responsibility
[4] was to the competitors or a — an individual whose
[5] sole responsibility was to the — to the
[6] congressman. The answer is —

[7] BY MR. TILLERY:

[8] Q: What competitors?

[9] A: Yes, they are part of the public interest
[10] the same as consumers. The FCC, in doing this, had a
[11] responsibility, which I believe it fulfilled
[12] wonderfully, to the entire public interest that fully
[13] includes consumers as an important part but which is
[14] not limited to consumers. The problem here in the
[15] regulation of CPE was that the states were deemed —
[16] historically, continually, up until they were
[17] actually preempted, to take consumers, who also were
[18] voters, as well, and to put their interests so far
[19] above the other portions of the public interest that
[20] the market got screwed up and it was to prevent that
[21] that the FCC stepped in and engaged in actions that,
[22] as I say, I believe I said it in my testimony, have

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[1] been wonderfully successful.

[2] Q: How would talking to consumer advocates
[3] screw up the market?

[4] A: We did talk to consumer advocates.

[5] Q: Involving them in this process of
[6] negotiation?

[7] MR. BENNETT: I object to the question
[8] because you are mischaracterizing the testimony.

[9] BY MR. TILLERY:

[10] Q: How would that screw up the market?

[11] A: I know I testified before that as part of
[12] the discussions leading to this, we talked to
[13] consumer advocates and we did. You asked me whether
[14] I spoke to a specific enforcement person at the FCC,
[15] not whether we spoke to consumer advocates. We did.
[16] There were people out there that were treated exactly
[17] the same. They had every bit as much access as
[18] anybody else who wanted to. The fact is, I
[19] personally was very proud of the fact that — always
[20] have been, that the actions that I took, which were
[21] very market-oriented actions, you know, this was in
[22] the Reagan Administration, which was very

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[1] market-oriented, absolutely believed and have always
[2] believed that they have been strongly in the
[3] interests of consumers. That doesn't mean that every
[4] single individual consumer has benefitted from every
[5] action but consumers as a class have benefitted
[6] tremendously, and consumer advocates — I,
[7] actually — I mean I was personal friends with most
[8] of the major consumer advocates, talked with them
[9] professionally, talked with them socially, did
[10] pro bono consulting for them during my hiatus, the
[11] period between my visits at the FCC, and so we are
[12] very interested in consumer advocates' points of
[13] view. Consumer advocates had a basic interest to get
[14] rates as low as possible for as long as possible.

[15] Those interests were very, very, very close to the
[16] state commission's interests. So, basically, had two
[17] groups which, in many of their arguments, were
[18] interchangeable, and both of them, and to be fair, a
[19] significant number of the politicians, the people on
[20] the Hill, had exactly the same interests, as well.
[21] Those interests were fully taken account of during
[22] these negotiations and they probably considered the

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[1] politicians, if anything, had better access to us,
[2] that interest group, the group arguing for lower
[3] rates and longer freezes, had better access to us
[4] than anybody else.

[5] Q: Did the FCC possess expertise in the field
[6] of consumer behavior?

[7] MR. BENNETT: Objection to the form of the
[8] question.

[9] THE WITNESS: No.

[10] BY MR. TILLERY:

[11] Q: Mass media communications?

[12] A: Yes.

[13] Q: Who did they have at the FCC when you were
[14] there who was an expert in mass media communication?

[15] A: We had a whole mass media bureau.

[16] Q: Who was the head of it?

[17] A: Jim McKinney at the time.

[18] Q: And was that person involved in reviewing
[19] this deal that was being made with AT&T?

[20] A: Only at the highest level. Since he was
[21] a — a bureau chief, he sat in on some of the senior
[22] management meetings but that was the — that was the

[1] mentioned before.

[2] Q: They all gave input?

[3] A: I know they did, yes, because I talked to
[4] all of them after I was there and, yes, at least all
[5] of them gave — as well as some other people.

[6] Q: What input did they give regarding that
[7] notice?

[8] A: I know they reviewed it and I know they
[9] made suggested edits to it. I don't know what they
[10] were.

[11] Q: What edits did they make?

[12] A: I don't know.

[13] Q: Was it initially prepared by AT&T?

[14] A: Yes.

[15] Q: Was it primarily a marketing piece?

[16] MR. BENNETT: I object to the form of the
[17] question. It is vague and ambiguous.

[18] THE WITNESS: No.

[19] BY MR. TILLERY:

[20] Q: Was it designed to give notice to
[21] customers? Was its initial purpose to give notice to
[22] the customers?

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[1] only context.

[2] Q: You know that 1983 notice that you have
[3] referenced in your report that AT&T sent out?

[4] A: Yes.

[5] Q: When was the first time you ever saw that?

[6] A: When I got it, which would probably have
[7] been sometime December 1983.

[8] Q: When you got it when? How did you get it?

[9] A: It was sent to me at my home.

[10] Q: You didn't see it while you were at the
[11] FCC, did you?

[12] A: I did not.

[13] Q: Did the FCC have any involvement in
[14] preparing it?

[15] A: They did not — the answer is yes, they
[16] gave AT&T suggestions. AT&T showed them drafts and
[17] they gave AT&T suggestions.

[18] Q: Who gave AT&T suggestions at the FCC?

[19] A: People that I know were involved in it were
[20] Jack Smith, who was then the bureau chief at that
[21] period of time, Jim Smith, who was still there at
[22] that point, Kathy Levitson, Greg Vogt, who I

[1] A: To tell them they had to make a choice,
[2] yes.

[3] Q: Right. Was that notice by the FCC a
[4] mandate by FCC to AT&T or did AT&T suggest that that
[5] notice be given? Whose idea was it?

[6] MR. BENNETT: Object to the form of the
[7] question.

[8] THE WITNESS: It was the FCC's requirement.

[9] BY MR. TILLERY:

[10] Q: The FCC came up with that initially?

[11] A: Absolutely.

[12] Q: When?

[13] A: When I was there. That's exactly — this
[14] was the — the modified negative option that I
[15] described.

[16] Q: Okay. Who came up with that idea at the
[17] FCC?

[18] A: I did.

[19] Q: You came up with it?

[20] A: Yes.

[21] Q: When?

[22] A: I can't remember precisely. It would have

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[1] doing it in practice. And, secondly, it was a high
[2] enough price to produce a very favorable result for
[3] local rate payers.
[4] Q: What's a local rate payer?
[5] A: Somebody who takes local phone service from
[6] a regulated — in this case, Bell Telephone Company.
[7] Q: Was the — was the allocable number that
[8] was — that was credited there — paid, if you will,
[9] was that changed in 1987 by any legal action?
[10] A: The — the number that was paid —
[11] Q: Yes.
[12] A: — for the CPE?
[13] Q: Right.
[14] A: Not counting tax impact?
[15] Q: Right.
[16] A: I think there was a very minor adjustment,
[17] as I recall, on second or third recon. I'm trying to
[18] remember exactly what it was but it had to do with
[19] the implementation of net book, the way the records
[20] were kept rather than the concept.
[21] Q: Let's go back to my question about embedded
[22] base customers, okay? Is that preemption that you

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[1] charge to exist, is that implied preemption?
[2] A: Yes.
[3] Q: Do you know what obstacle implied
[4] preemption is?
[5] MR. BENNETT: Objection to the form of the
[6] question.
[7] THE WITNESS: The answer is, I would
[8] assume — I guess "no" is the operative word. I
[9] would assume that because you can't place an obstacle
[10] in the path of the achievement of federal objective,
[11] the method chosen, appropriately chosen by a federal
[12] agency to achieve that objective, it is something
[13] which is an obstacle in the path of doing that. If
[14] it is — an insurmountable opposite is always
[15] preempted. If it is an obstacle that you can
[16] surround, that you can avoid with some difficulty but
[17] is, basically, avoidable, it may or may not be
[18] preempted depending on the specifics of how the
[19] preemption was accomplished.
[20] BY MR. TILLERY:
[21] Q: Well, the second part, are you describing
[22] impossibility implied preemption, is that what you

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[1] are trying to describe?
[2] A: Yes, I think it was the first part, but
[3] yes.
[4] Q: Okay. What federal regulation would have
[5] governed AT&T after January 1, 1986 in terms of
[6] impossibility implied preemption? How would it have
[7] been impossible for AT&T to have complied with that
[8] regulation —
[9] MR. BENNETT: Objection to the form of the
[10] question.
[11] BY MR. TILLERY:
[12] Q: — and simultaneously comply with the
[13] claims or not do that which the plaintiffs claim they
[14] should have known.
[15] A: I want to —
[16] MR. BENNETT: Form of the objection.
[17] THE WITNESS: If AT&T had voluntarily done
[18] this, it was free to do so. The —
[19] BY MR. TILLERY:
[20] Q: Voluntary — voluntarily done what?
[21] A: Voluntarily done something like changing
[22] the name it called the equipment on the bill, so it

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[1] didn't call it equipment anymore. That — the
[2] conflict here —
[3] Q: Didn't call it leased equipment?
[4] A: Yes. Didn't —
[5] Q: So, in other words, if they had chosen to
[6] tell their customers specifically what it was they
[7] were leasing as opposed to doing what has been
[8] alleged in this case as being causing or giving rise
[9] to confusion, there would have been nothing wrong
[10] with that?
[11] MR. BENNETT: I object to the lack of
[12] foundation.
[13] BY MR. TILLERY:
[14] Q: Is that what you are saying?
[15] A: What I am saying is if they had voluntarily
[16] decided to do that in response to some market demands
[17] and not been required to do it by — by some state
[18] law.
[19] Q: So it wasn't impossible, then. It wasn't
[20] under the impossibility implied preemption doctrine,
[21] was it?
[22] A: What wasn't? AT&T doing it or AT&T

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[1] complying with an obligation?

[2] Q: You said that AT&T could have done it on
[3] its own.

[4] A: If there was no obligation.

[5] Q: You know, if AT&T had decided to put the —
[6] the full and precise description on the phone lease
[7] bills after January 1, '86, there was no regulation
[8] that by doing so it would have violated. Therefore,
[9] there was no preemption.

[10] A: There was no presumption of voluntarily
[11] conduct by AT&T.

[12] Q: Right.

[13] A: There was preemption of an obligation on
[14] AT&T to do it.

[15] Q: So voluntarily — voluntarily doing these
[16] things were not a problem?

[17] A: That's correct. And the same way that —
[18] that I have given you my opinion, recognizing you may
[19] not agree with it, that the state wasn't free to
[20] determine what the price should be for the CPE.
[21] Having said that, AT&T was totally free to determine
[22] the price, even if I — if I believe, as I certainly

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[1] do, and I think the record totally supports, the
[2] state wasn't free to decide that the price freeze
[3] should extend five years instead of two years, AT&T
[4] was totally free to do that on its own. No question
[5] about it. So the question isn't whether they would
[6] violate a rule by not changing the price for three
[7] more years, the question is whether or not they could
[8] be placed under a legal obligation by any state law
[9] or order or common law principle to do so.

[10] Q: All right.

[11] A: And that's —

[12] Q: I understand your answer. Did the FCC
[13] possess any expertise in the field of consumer
[14] psychology?

[15] MR. BENNETT: Objection to the form of the
[16] question. Vague with regard to expertise, vague with
[17] regard to consumer psychology.

[18] THE WITNESS: I'm not sure of the answer.

[19] They had, certainly in the Common Carrier Bureau, we
[20] had a consumer protection division by people who, to
[21] the best — I remember the person who headed that
[22] division under me, who I believe was a — had some —

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[1] had training in consumer psychology. That may have
[2] been her — her background had been, you know,
[3] consumer organizations and I think maybe —

[4] BY MR. TILLERY:

[5] Q: Was she working at the FCC as a consumer
[6] psychologist?

[7] A: No, she was a consumer protection person.

[8] Q: What was her job?

[9] A: She was head of the — the consumer
[10] protection branch of the Common Carrier Bureau.

[11] Q: Was she involved in the negotiations with
[12] AT&T?

[13] A: No.

[14] Q: Did you talk to her when you were
[15] negotiating with AT&T?

[16] A: No.

[17] Q: Why not?

[18] A: I'm not sure what she had to contribute to
[19] the —

[20] Q: How do you know if you didn't ask her?

[21] A: There were — there were 1,900 people at
[22] the FCC that I didn't ask, also.

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[1] Q: I'm not talking about the other 1,899.

[2] A: But your response is how could you know if
[3] you didn't ask her. I — I talked to those people
[4] who I believed had something to contribute, who I
[5] thought had expertise relevant to this and not to the
[6] others.

[7] Q: You don't think that the people who were
[8] there specifically for the purpose of looking out for
[9] consumers would have been somebody you would want to
[10] talk to?

[11] A: About the negotiations?

[12] Q: You bet.

[13] A: No. About — about the review of the
[14] specific materials that they submitted that were not
[15] attached as an appendix to the order, at a later
[16] point, yes.

[17] Q: Well, wait a minute now. You told me this
[18] was, basically, a foregone conclusion when you left
[19] in June of '83.

[20] A: Yes.

[21] Q: This thing was done. Then what good is it
[22] going to be to talk to them later? This thing was

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[1] Q: And could language that says you have to be
[2] fair to your consumers, could that type of consumer
[3] fraud statute that requires basic fairness to
[4] consumers be enforced with respect to AT&T's leasing
[5] of CPE?

[6] A: Not in all circumstances. The example
[7] which comes up here is if a state decides that
[8] fairness requires a price freeze for not two years
[9] but five years, my answer is it does not matter how
[10] the state decides that, if the state decides that,
[11] whether it does it prospectively or retrospectively
[12] through the award of damages, it is not free to do
[13] that.

[14] MR. TILLERY: Let's go off now at this
[15] time, off of tape 2.

[16] THE WITNESS: I tried to finish it up
[17] quickly when you —

[18] MR. TILLERY: Right.

[19] MR. KING: We are off the record at 3:14.

[20] (Pause.)

[21] MR. KING: We are back on the record at
[22] 3:15 and this is the beginning of tape 3 in the

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[1] Albert Halprin deposition.

[2] BY MR. TILLERY:

[3] Q: Could you tell me, sir, what you — on what
[4] you base your claim that the FCC preempted any state
[5] rules based upon AT&T's inheritance of the embedded
[6] base?

[7] A: On the fact that the AT&T — that the —
[8] that AT&T submitted a proposal, which was approved by
[9] the FCC, which essentially said, to put it in the
[10] vernacular, what they were going to pay for the
[11] embedded base. It was a bargain. And as part of the
[12] process, I'm not sure if this is in the record, I
[13] think it is somewhere in one of these documents, but
[14] it — for example, the FCC at one point approached
[15] AT&T to see if they would also take over the embedded
[16] inside wire base at net book and they said flat out,
[17] "No. Absolutely not. If you put that in the order,
[18] we will take you to court." Our judgment is they
[19] would have won. So it was a bargain for in the real
[20] world, a trade-off between what — what they would
[21] give and what they would get.

[22] Q: So who ended up getting the inside wire?

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[1] A: The BOCs.

[2] Q: Inside wire?

[3] A: Yes.

[4] Q: From — what do you describe the inside
[5] wire as?

[6] A: I'm sorry. Inside wire?

[7] Q: Yes. What were you just saying?

[8] A: That the BOCs got the inside wire. Inside
[9] wire.

[10] Q: What is the inside wire?

[11] A: Inside wiring is wiring that — that
[12] essentially connects the network interface to the
[13] instrument in the house to the telephone to the
[14] equipment.

[15] Q: So from the interface on the outside of the
[16] house —

[17] A: Or on the inside.

[18] Q: — to the telephone?

[19] A: Could be on the inside.

[20] Q: Or an apartment complex to the telephone;
[21] right?

[22] A: Yes.

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[1] Q: Who ended up getting that wire?

[2] A: That wire?

[3] Q: Yes.

[4] A: Simple wire? BOC.

[5] Q: Okay. And — and then the interface, the
[6] wire from the interface on was Bell Operating
[7] Company, as well?

[8] A: Yes. Yes. And —

[9] Q: Did the customer ever get the inside wire?

[10] A: The customer got access to the inside
[11] wire. The inside wire, it is important to remember,
[12] had negative salvage value, had no value at all. The
[13] wire was worth nothing. The issue that later arose
[14] was the ability of the owner of the wire to disable
[15] it, if you told them that you don't want to pay them
[16] for it anymore. And that was taken away from the
[17] owners of the wire. So while customers — the FCC
[18] proposed giving it to customers and then decided not
[19] to formally transfer ownership of it to customers,
[20] gave them control of it without ownership, after
[21] having originally proposed to give them ownership.
[22] But the — the point I was making is that —

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[1] Q: So the wire to this day inside homes is
[2] owned by whom? Owned.
[3] A: I think it's been — if it's been fully
[4] depreciated at that point, the customer may own it.
[5] I think the customer does own it if it's been fully
[6] depreciated.
[7] Q: How did that happen? Tell me how legally
[8] that happened.
[9] A: The FCC originally proposed to transfer
[10] just like embedded base.
[11] Q: No. Here. Was there a subsequent transfer
[12] order?
[13] A: I believe so, yes.
[14] Q: When was that?
[15] A: I can't remember.
[16] Q: That gave the inside wire to the homeowner;
[17] right?
[18] A: Yes. After it was — I believe it was
[19] fully depreciated by that point. The FCC — I mean
[20] how it happens, the FCC originally had such an order,
[21] reversed it and gave them control over it but not and
[22] then said, "When it is depreciated, you own it and it

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[1] is all depreciated now," so since no new wire is
[2] permitted to go into the rate base. It is also
[3] important to remember that what was in the rate base,
[4] what we are talking about depreciating there, was
[5] capitalized labor, 98, 99 percent capitalized labor.
[6] The — to get back, I think, to what I recall the
[7] question —
[8] Q: Yes. We were talking about the inheritance
[9] of the embedded base and you told me —
[10] A: In fact, this was a bargain, that AT&T —
[11] AT&T at the time did not — was not very interested
[12] in taking the CPE, the embedded CPE equipment,
[13] particularly residential CPE and particularly at net
[14] book value. They argued, I think with a fair degree
[15] of accuracy, that the equipment was not worth net
[16] book value. Now, when we talk about selling it to
[17] AT&T at net book value, it is important to remember
[18] who was selling it to AT&T.
[19] Q: What question are you answering right now?
[20] A: I'm answering the question about why the
[21] deal couldn't be changed.
[22] Q: What deal — my — let me — let me go back

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[1] over and explain to you what the question is. Okay?
[2] On what do you base your claim that the FCC preempted
[3] any state rule, consumer fraud action based upon
[4] AT&T's inheritance of the embedded base?
[5] A: And the answer, and I guess I don't have to
[6] go through all the details, was that the price that
[7] AT&T paid for that inheritance was governed by the
[8] FCC order after lengthy negotiations and that
[9] changing that bargain was totally inconsistent with
[10] that order. Imposing additional conditions for
[11] saying the base was worth so much to you that we are
[12] going to impose these additional conditions, was
[13] changing the bargain.
[14] Q: Let me ask you something. How does the
[15] base price, that is the embedded base price, have any
[16] bearing on obligations to these embedded base
[17] customers after January 1, '86?
[18] A: Oh, because AT&T, through a combination of
[19] the sale of the embedded base at a given price, along
[20] with the way they offered people the option of
[21] purchase, "If you want it to, you can; if you don't
[22] want to, you don't have to," was essentially an

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[1] overpayment for that CPE and so they overpaid that
[2] CPE in return for a deal in which they would be free
[3] to price in the market for a period of time
[4] thereafter.
[5] Q: Why did they overpay for it?
[6] A: Because it wasn't worth net book.
[7] Q: What was it worth?
[8] A: It is impossible to determine with
[9] precision what it was worth.
[10] Q: What do you think it was worth?
[11] A: If I had to make — I don't know. Probably
[12] a couple billion less than net book.
[13] Q: What was net book? What was the number?
[14] A: I don't remember.
[15] Q: Why was it set at net book?
[16] A: For two reasons. Number one, is it was
[17] determined by the FCC that it was not possible to
[18] come up with a detailed accurate estimation of the
[19] value, even if it existed in theory, and what — the
[20] FCC was unconvinced that in theory there was such a
[21] true valuation. The recordkeeping, the way the
[22] records were kept in depreciation groups precluded

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[1] compliance with a specific FCC regulation.

[2] A: Okay. I — it would not — and I

[3] misunderstood the question. I thought the first time

[4] you asked if what is being required here had been

[5] required of AT&T contemporaneously. If AT&T

[6] voluntarily, in response — what they were told is,

[7] "You are in a marketplace. Decide what to do." If

[8] they had decided to change the title, they would have

[9] violated nothing. If they had been required — if

[10] instead of retrospectively saying you would violate

[11] people's rights under a consumer protection law —

[12] Q: Right.

[13] A: — by doing this, if somebody had come in

[14] and said it is a violation of consumer protection law

[15] to do this, to avoid damages rolling up, we are

[16] seeking injunctive relief to require you to do this,

[17] that would have violated the rule.

[18] Q: What would have violated the rule?

[19] Injunctive relief?

[20] A: A state requirement to do this. That's

[21] what I thought you asked the first time.

[22] Q: I think maybe we have had a little bit of a

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[1] disconnect here.

[2] A: Okay.

[3] Q: What I am trying to get at is this, sir.

[4] You understand, generally, the allegations being made

[5] in the complaint.

[6] A: I believe so, yes.

[7] Q: What I'm trying to get at is if AT&T had

[8] complied with the obligations the plaintiffs allege

[9] that it should have complied with under the state

[10] consumer fraud laws, ala the complaint, okay, can you

[11] tell me any FCC regulation with which it would have

[12] been impossible for AT&T to comply?

[13] A: I'm — I have tried to respond to this and

[14] I think — I think I was right the first time about

[15] the question. If these were obligations, that would

[16] have been a violation of the order.

[17] Q: If what were obligations?

[18] A: The things — the example you gave. When

[19] you say, "complied with the obligation" —

[20] Q: You are talking about utility type

[21] obligations?

[22] A: Yes, an obligation, for example, to

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[1] disclose to — to say what the name of the equipment

[2] is or the other ones we have covered. That's what I

[3] am trying to distinguish between if AT&T did it

[4] voluntarily, they just decided it's a good idea.

[5] Q: I'm trying to get our semantics correct.

[6] I'm not trying to interrupt you to be rude. I'm

[7] trying to get our semantics correct. When you say,

[8] "obligations," are you talking about utility type

[9] obligations or state public utility commission or

[10] some Commerce Commission instructs AT&T to do certain

[11] things or are you talking about their legal

[12] obligations under consumer fraud laws?

[13] A: An obligation imposed by a state, what I am

[14] saying is those are equivalent in these cases. If

[15] they are special obligations imposed by the state

[16] which are not imposed on every provider of goods and

[17] services, you know, if they are special because of

[18] the embedded base, AT&T or CPE, those are utility

[19] type obligations which cannot — you know, could not

[20] be imposed on AT&T. So — and I will repeat. If

[21] there had been such an obligation and somebody had

[22] attempted to enforce it then, you are saying if AT&T,

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[1] if they had complied, if it — they complied because

[2] it was an obligation, because somebody said, "This is

[3] an obligation. You have to do it," I think people

[4] would have come to the FCC, sought a specific order

[5] that they were preempted and I think they would have

[6] gotten it.

[7] Q: A specific order that what — that the —

[8] that these claims —

[9] A: That a statement —

[10] Q: — by complying with the claims, the state

[11] consumer fraud claims, by doing those things?

[12] A: Yes. That a state attempt to — to have a

[13] law, consumer protection or any other law that says

[14] you have to encourage people to buy by giving them a

[15] specific comparison of lease rates and purchase

[16] rates, where it doesn't apply to anything else, yes,

[17] that — that was preempted, would have been

[18] preempted, whether AT&T did it or not, if a state

[19] attempted to impose that obligation, through —

[20] Q: Where I am having trouble is where you are

[21] saying a state imposed that obligation.

[22] A: I'm sorry. I thought your question said if

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[1] AT&T had complied with its obligations.
[2] Q: Actually —
[3] A: It came from state law.
[4] Q: Actually, I said as plaintiffs allege in
[5] this complaint under the state consumer fraud laws.
[6] And where I think we are having trouble is maybe a
[7] distinction between utility type state regulations
[8] versus allegations made under state consumer fraud
[9] laws. Let me start over. Let's start over and see
[10] if we can get it square. Okay? Let me start over.
[11] A: Can I just say — I just want to say
[12] because I —
[13] Q: You are not drawing a distinction between
[14] the two, are you?
[15] A: I'm — a state imposed obligation, which is
[16] a special nongeneral obligation, I'm not doing a
[17] distinction, and I really think, I mean I — I am not
[18] trying to prolong this or other, but I am sure when
[19] we look at this, that in that question when you did
[20] it, you said their obligations because I mean I —
[21] Q: I did. I said their obligations plaintiffs
[22] allege under state law.

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[1] A: All right. And that's what I am saying.
[2] For some — for a state, state law, to make this an
[3] obligation would have been a violation. The FCC
[4] would have preempted it and so that's why — that's
[5] what I was trying from the first here, to distinguish
[6] between AT&T deciding that it thinks for some reason
[7] to get good will that it wants to publish something,
[8] giving the crossover point for purchase and sale in
[9] terms of actual dollars, ignoring the value of these
[10] or things, which are greatly debated, I mean this is
[11] an insurance policy, in large part, but assuming that
[12] it is — ignoring that, even if — they want to say,
[13] "Well, you should know you are getting insurance,
[14] but if you don't care about that, here's the
[15] crossover," AT&T was free to do that voluntarily. A
[16] state was not free to impose such an obligation on
[17] AT&T for its CPE where it is not generally imposed on
[18] every provider of equipment which can be leased or
[19] sold.
[20] Q: Do you have some belief that state consumer
[21] fraud laws in Illinois or New Jersey are being
[22] applied in a discriminatory fashion by virtue of the

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[1] lawsuit here?
[2] A: Yes.
[3] Q: Do you have some belief that the state
[4] consumer fraud laws in New Jersey and Illinois don't
[5] have equal application to anybody else who — who
[6] happens to act in the same fashion?
[7] A: I —
[8] Q: What is it about the application here that
[9] makes you think they are being applied in a
[10] discriminatory fashion towards AT&T and Lucent?
[11] A: The fact that the conduct, which AT&T is
[12] being accused of, and the conduct which is described
[13] in the expert reports is, in large part, what I would
[14] describe as absolutely 100 percent typical conduct of
[15] anybody in a deregulated marketplace, which, I do not
[16] believe — and I — I want to repeat, you asked me it
[17] first, I'm not an expert in the consumer fraud laws
[18] of Illinois or New Jersey, but the notion that
[19] someone violates consumer fraud laws by not telling
[20] you that your utility service won't be cut off if —
[21] if you don't buy — if you don't pay for a modem or
[22] something else is silly. People don't have those

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[1] types of obligations in the marketplace under
[2] consumer fraud laws. They don't have —
[3] Q: You are saying that you know that for a
[4] fact?
[5] A: That they don't have —
[6] Q: That the consumer fraud laws don't govern
[7] that?
[8] A: That they don't — yes, they don't require
[9] people to go out and tell you that you can get this
[10] from one of my competitors, yes.
[11] Q: Let's now maybe — maybe we can go back to
[12] our question. All right? How can a statute like the
[13] Illinois consumer fraud statute that requires
[14] fairness in dealing with consumers be enforced
[15] without reference to the particular circumstances of
[16] that case?
[17] MR. BENNETT: Object to the form of the
[18] question.
[19] THE WITNESS: I think that something that
[20] only says you have to be fair does require looking at
[21] the specific circumstances of the case to enforce.
[22] BY MR. TILLERY:

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[1] you can't use the bathroom.

[2] (Laughter.)

[3] MR. KING: We are off the record at 2:49.

[4] (Recess.)

[5] MR. KING: We are back on the record at
[6] 2:56.

[7] THE WITNESS: Okay. I did — you want me
[8] to just try and answer the last question?

[9] BY MR. TILLERY:

[10] Q: Yes, sir.

[11] A: I went through the — the different ones
[12] and most of them I would say are identical before —
[13] between 1984 and 1986 and thereafter. There are one
[14] or two that I think may be slightly different or
[15] different between 1984 and 1986 and thereafter. The
[16] pricing is tariffing before or after makes no
[17] difference at all. The — a failing to adequately
[18] disclose the total dollar amount they had paid and
[19] that the total amount far exceeded the actual value,
[20] same before and after, makes no difference at all.
[21] It is hard to imagine anything more regulatory than
[22] that. We even saw the fact that, I guess, the value

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[1] is something that's being argued about here. The FCC
[2] didn't want governments determining the value of CPE,
[3] wanted the market to do that.

[4] Failing to adequately disclose and explain
[5] to plaintiffs and class members material terms and
[6] conditions, this is one, let me say, there is no
[7] question at all between '84 and '86 that this could
[8] not be considered. It was absolutely preempted. If
[9] after '86 on the basis of something that does not
[10] apply any special obligation to AT&T, the embedded
[11] base or CPE, there is a general state requirement
[12] for — for all leases of anything that take place. I
[13] would say it would be preempted during '84 to '86 but
[14] not thereafter.

[15] D, failing to disclose the original cost or
[16] current value, equally the same. Can I use "before
[17] and after" as shorthand?

[18] Q: Yes.

[19] A: Before and after.

[20] Failed to adequately disclose to plaintiffs
[21] that there were meaningful alternatives to them,
[22] having AT&T as a deregulated company, having to tell

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[1] them, "You may not want to buy from us, you may want
[2] to do something else," same before and after.

[3] It is — failing to adequately disclose
[4] that participation was not required by plaintiffs and
[5] class members, the same before and after. Once
[6] again, before and after. A state — I just want to
[7] be clear what I am saying here — was 100 percent
[8] free to require the provider of the local utility
[9] service to say that. They just couldn't require AT&T
[10] to say that. The people — they regulated somebody
[11] who they could but they couldn't make them say that
[12] before or after.

[13] Failing to adequately disclose that the
[14] charges for leased equipment for residential
[15] telephones, the form of that same before or after.

[16] Failing to adequately disclose to
[17] plaintiffs and class members their right and option
[18] to terminate the rental agreement at will. I — this
[19] is what I am not sure of. Once again, if there is a
[20] state law that says any lessor of anything has to —
[21] at will, has to include a prominent description
[22] that — or whatever type of description within this

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[1] that says in so and so type, "You have the right to
[2] terminate this," if that was applied on a neutral
[3] basis, I — I'm not 100 percent certain that would
[4] have been preempted during '84 to '86. It might have
[5] been, but it would not be preempted thereafter.

[6] The — number I, I have not said any
[7] preemption on before or after. This is, basically,
[8] saying something was something other than it is.
[9] That's not a — that's technique which does apply to
[10] the best of my knowledge, I hope so, to anything
[11] regardless of who is providing it or what it is.

[12] Collecting in advance. Once again, this is
[13] one that I think may well be different. Clearly was
[14] prohibited during the transition period. If there is
[15] a rule that says no lessor can collect anything in
[16] advance after the transition period, I think that
[17] could apply to AT&T, as well.

[18] Q: It wouldn't be preempted after '86?

[19] A: Not after, if it complied with those
[20] conditions.

[21] Q: Right.

[22] A: In other words, if it was not specific.

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[1] The — the K is — is also one that insofar
[2] as it's a neutral rule, not being applied specially
[3] to embedded customers, AT&T or CPE customers,
[4] different before and after.
[5] Q: Preempted before, not preempted after;
[6] right?
[7] A: Clearly preempted before and I think — if
[8] it just, basically, said, you know, stuff has to be
[9] printed — every lease arrangement has to be printed
[10] in part X type after it would have been valid and
[11] could be applied to AT&T. I'm not 100 percent
[12] certain. It would have been preempted before. It
[13] very well may have been, since the FCC — certainly
[14] during the period of time when the FCC and, I
[15] believe, the district court, as well, were
[16] specifically approving the form of bills because of
[17] shared billing arrangements and the like, anybody who
[18] said that violates the law was preempted, but
[19] that's — that, I would say, was preempted before and
[20] not after on the basis of a totally neutral rule.
[21] L, as well. I mean if it is — the —
[22] different before and after. The terms and

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[1] conditions, you know, exactly what disclosures were
[2] made were governed before, thereafter, general rules
[3] not spec — not singling out AT&T embedded base or
[4] CPE were okay.
[5] M makes no difference and I don't think
[6] could apply before, and this is one that, basically,
[7] says you shouldn't be able to close the phone center
[8] stores. I think that was — that's tariff regulation
[9] thereafter. It is common carrier regulation
[10] thereafter.
[11] Q: You have covered them now?
[12] A: I believe so.
[13] Q: All right.
[14] A: Tried to.
[15] Q: After January 1, 1986, was there ever any
[16] FCC regulation with which it would have been
[17] impossible for AT&T to comply if AT&T had complied
[18] with the obligations plaintiffs allege it should have
[19] under state law?
[20] A: Yes. I mean I think if AT&T, basically,
[21] complied with state requirements to do this, which
[22] were geared at making the offering better for

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[1] consumers, I believe that competitors would have been
[2] before the FCC arguing that even if AT&T was prepared
[3] to do it and didn't want to challenge it themselves,
[4] that it interfered with the FCC regulatory scheme
[5] and — and was preempted and I believe the FCC would
[6] have been decided it was preempted. It is
[7] important —
[8] Q: My question, though, specifically was
[9] which — which FCC regulation would it have been
[10] impossible for AT&T to have complied with if they had
[11] done the things that the plaintiffs alleged they
[12] should have done or not done the things that the
[13] plaintiffs alleged they shouldn't have done in this
[14] case?
[15] A: And what I tried to say is that, in my
[16] judgment, if that had happened for the reasons I just
[17] told you, people would have come in and argued that
[18] AT&T was violating the Computer II order by doing
[19] that.
[20] Q: Are you talking about pricing now,
[21] primarily? What is it that you are talking about?
[22] A: Anything that made the AT&T offering more

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[1] attractive for consumers that was mandated by a
[2] state.
[3] Q: Well, for example, if AT&T had described
[4] their phone equipment after 1986 as something other
[5] than leased equipment — did you understand that's an
[6] allegation in the case?
[7] A: Yes.
[8] Q: Okay. You understood that one of the
[9] allegations is that AT&T had the ability to put the
[10] actual phone on the bill, the actual phone
[11] description on the bill but, instead, chose to use
[12] terms like "leased equipment" or an abbreviation that
[13] made it difficult for consumers to understand what
[14] they were being charged for. Do you understand
[15] that's an allegation?
[16] A: Yes, I do.
[17] Q: Okay. Now, let's assume that AT&T had,
[18] instead of doing what the plaintiffs allege they
[19] shouldn't have done, had actually put on the phone
[20] bill the description of the precise type of equipment
[21] on the billing that the plaintiffs say they should
[22] have. Tell me how that would have frustrated AT&T's

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[1] for reconsideration of that or challenge that order
[2] in federal court but they can't go out and just do
[3] the same thing and say it is a state consumer
[4] protection law.

[5] Q: Aren't you talking about the transition
[6] period of time now, sir?

[7] A: No, I'm talking about after the transition
[8] period. The FCC decided when the transportation
[9] period would end. I'm sorry.

[10] Q: Your statement you just made about these
[11] groups coming in extended beyond the transition
[12] period, your claim is?

[13] A: Oh, yes.

[14] Q: Okay. So your — your statement is that
[15] there is no distinction in terms of challenge to
[16] behavior from January 1, '84 on?

[17] A: That's correct, that the FCC authority to
[18] set these terms and conditions, when it said as of
[19] January 1st, '86, these obligations end, that they
[20] were making an affirmative decision that there should
[21] not be obligations of this type after that and that
[22] while anybody was free to come in again, yet again,

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[1] through a petition for rulemaking, and once again
[2] make the argument about what the obligation should be
[3] imposed, they weren't free to go out and do it by
[4] themselves.

[5] Q: Let me see if I can clarify this. Is it
[6] your belief that a challenge to the conduct of AT&T,
[7] let's say in 1987, based upon the notice that they
[8] gave or didn't give there, embedded base CPE
[9] customers, would be scrutinized from the standpoint
[10] of implied and express preemption, precisely the same
[11] way as if that same conduct were challenged in the
[12] transition period?

[13] A: There is a statute of limitation on
[14] complaints.

[15] Q: Let's forget the statute of limitations for
[16] a minute.

[17] A: Okay. I mean if you want to eliminate that
[18] and say in 1987 somebody came in and complained about
[19] an action that took place during the transition
[20] period —

[21] Q: No. No.

[22] A: I'm sorry. I misunderstood what you said

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[1] then.

[2] Q: You just told me a few minutes ago that
[3] from the standpoint of implied or express preemption,
[4] you would evaluate conduct pre and post 1986 in the
[5] same fashion.

[6] A: Yes.

[7] Q: Didn't you?

[8] A: Yes.

[9] Q: All right. Now, my question is from the
[10] standpoint of whether or not that conduct is
[11] impliedly or expressly preempted, I think you are —
[12] you are not claiming it is expressly preempted, are
[13] you, most of this?

[14] A: No.

[15] Q: All right. So to the extent that the claim
[16] that it is impliedly preempted is made, is — let's
[17] pick a charge against AT&T and say that they didn't
[18] give adequate notice to their embedded base CPE
[19] customers, just a claim, a charge, okay?

[20] A: Uh-huh.

[21] Q: Would that charge be scrutinized for
[22] purposes of implied preemption in precisely the same

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[1] way as if it took place between '84 and '86, as if it
[2] took place in '87?

[3] A: The thing I'm having a hard time
[4] understanding is whether or not you are talking about
[5] the charge being made between —

[6] Q: Yes.

[7] A: — or the allegation of AT&T's conduct took
[8] place.

[9] Q: Yes. Yes. The conduct took place — in
[10] one instance the conduct took place that's being —
[11] that's being charged as improper —

[12] A: Okay.

[13] Q: — between '84 and '86.

[14] A: So it is not when the thing was filed.

[15] Q: That's correct.

[16] A: What I misunderstood, I thought you were
[17] talking about something filed after '87 having to do
[18] with the notice that was given to the embedded base
[19] customers which couldn't take place —

[20] Q: No. No. No. No. No.

[21] A: — there were no embedded base customers
[22] after that.

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[1] Q: No. I'm talking about — I'm talking about
[2] allegations of misconduct, one, occurring in the
[3] transition period, and another occurring in, say,
[4] '87.

[5] A: Right.

[6] MR. BENNETT: I object to the question
[7] because it is vague with regard to what kind of
[8] allegation you are talking about.

[9] BY MR. TILLERY:

[10] Q: Do you understand? And the allegation, I'm
[11] just picking one, is that they failed to give
[12] adequate notice.

[13] MR. BENNETT: Still object to the form of
[14] the question regarding — because it is vague with
[15] regard to what.

[16] THE WITNESS: Okay. I think I do
[17] understand. I misunderstood it initially. But as
[18] I — do you want me to go on —

[19] BY MR. TILLERY:

[20] Q: Yes, go ahead.

[21] A: But as I understand it now, the answer is
[22] yes, they are equally preempted. Specifically, if,

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[1] for example, somebody wanted to claim that AT&T was
[2] committing straight fraud, okay, they sold a — an
[3] instrument that had nothing inside it, all right, as
[4] a working piece of CPE, that is a good claim under
[5] state law, you know, if there is a — a relevant
[6] state law, which I think there is in every state,
[7] both during the transition period and after the
[8] transition period, equally good in both cases, a
[9] claim that AT&T was, your specific example, not
[10] giving enough notice of a price increase, I would
[11] say, would be exactly the same before and after.
[12] There was no longer — I mean the FCC order
[13] specifically said when they could raise prices and
[14] for somebody to come in after it and say — I mean
[15] this is a good example, this is the example I gave —
[16] "You, AT&T, can't raise prices without giving 90
[17] days' notice and publishing it in every paper," was
[18] equally prohibited after the transition as it would
[19] have been during the transition.

[20] Q: All right. Let's — let's — maybe I can
[21] shorten this up this way. You remember when you went
[22] through the complaint and you identified all these

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[1] specific allegations that you thought were impliedly
[2] preempted?

[3] A: Yes, sir.

[4] Q: Now, are any of those time sensitive in
[5] terms of being subject to preemption claims and at
[6] one era but not at another era?

[7] A: I don't think so. The ones that I didn't
[8] cover as being in my opinion preempted, I think,
[9] dealt with conduct which, whether it is true or not,
[10] I have no opinion on that, was not preempted if it
[11] took place during the transition period, as well.

[12] Q: I want to make sure I understand you. The
[13] claims that are set out in the plaintiffs' complaint,
[14] third amended complaint, which we have identified on
[15] the record that you have reviewed, it doesn't matter
[16] in your opinion when those took place in this case?

[17] A: The claims that say that AT&T should have
[18] done things, which regulators used to require them to
[19] do or might have required them to do in the future,
[20] the ones I identified, which are traditional
[21] regulated requirements, tariffing requirements, yes,
[22] that — their failure to abide by those is equally

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[1] preempted from being considered by the state, whether
[2] it took place before or after 1986.

[3] Q: Irrespective of the time? Before or
[4] after. It doesn't matter when?

[5] A: Yes.

[6] Q: During the transition period or after the
[7] transition period?

[8] A: Yes. Yes. Those matters.

[9] Q: Are any of them sensitive to the time
[10] period, any of the claims that we have made?

[11] A: I — give me one minute. Let me —

[12] Q: Sure.

[13] A: I had it right here. Do I have it here
[14] still?

[15] MR. BENNETT: I may have moved it.

[16] THE WITNESS: No, this is a real one. I
[17] mean it is easier for me in answering.

[18] MR. BENNETT: Let's go off the record. I
[19] think we can't — I can't — we have people walking
[20] around. Can I use the bathroom real quick while he
[21] looks at this?

[22] MR. TILLERY: We will go off the record but

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[1] had regular contact, once again, on a daily basis
[2] with both staff and commissioners from a number of
[3] states, as well as from what's called the NARUC,
[4] which is the organization representing both all state
[5] commissions and state — at that time, I believe,
[6] there was not a separate organization for state
[7] consumer advocates, that they were folded within
[8] that, they later spun off. We had regular
[9] discussions with a lot of others, as well, so when
[10] you say how is it spun together, it was a much more
[11] complex and broad-reaching set of inputs than what
[12] you have characterized and I think it is fair to say
[13] that a significant portion of it was self-generated.
[14] That was a matter, after having everybody tell you
[15] what they want, which was their job, of the FCC
[16] staff, determining what they thought was the best
[17] balance of interest on these key points and there
[18] were a lot of — of different points that — to be
[19] covered.

[20] Q: Let me ask you, sir, are sellers of
[21] residential CPE subject to state antitrust laws, in
[22] your opinion?

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[1] A: Yes.
[2] Q: Are lessors of residential CPE subject to
[3] state antitrust laws?
[4] A: Yes.
[5] Q: Can you think of a reason why AT&T wouldn't
[6] be subject to any state antitrust law by virtue of
[7] claims relating to embedded base CPE?
[8] A: Yes, I can think of a number of claims.
[9] Q: Tell me, please.
[10] A: During the divestiture proceeding, the
[11] arguments before Judge Green, a considerable number
[12] of states came in and claimed that the private
[13] agreement, I use the word "private" in quotes, it is
[14] with a public agency, reached between the Department
[15] of Justice and the — and AT&T, covering the MFJ,
[16] which had lots of matters involving the offering of
[17] different services, interfered with state laws, and
[18] as I recall, I didn't — as I recall, part of that
[19] decision explicitly stated, and I believe it was
[20] appealed and that the appellate decision also
[21] specifically stated that a federal antitrust decree
[22] preempted any inconsistent state law, so I think

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[1] insofar as AT&T was doing something, for example,
[2] that was required by the — the consent decree, and I
[3] would add insofar as AT&T does anything that is
[4] required by federal law or by federal order, that
[5] they can't be held to account for — by a state
[6] antitrust law for following that federal rule. And
[7] I — I — this is not — the best of my recollection,
[8] this is not specifically addressed within the scope
[9] of my — my testimony but I am quite certain that it
[10] is settled law that — that state antitrust law
[11] cannot override any federal requirement, whether it
[12] be from an antitrust decree, a court decree, a law or
[13] regulation, which is not ultra virus, which is within
[14] the authority of the agency or the relevant person at
[15] issue.

[16] Q: You agree that sellers of residential CPE
[17] are subject to state consumer protection laws; right?

[18] A: Once again, sub — to some. I mean I — as
[19] I said before, there are some state consumer
[20] protection laws, I can — I am — I do not purport to
[21] know every state consumer protection law in every
[22] state but I can certainly imagine state consumer

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[1] protection laws that I would not believe would be
[2] valid with respect to sellers of residential CPE.

[3] Q: Which ones? Give me the sort of the
[4] genera?

[5] A: Something that looks like tariff
[6] regulation. For example, a prohibition on getting
[7] out of the business is — there is a good example. A
[8] prohibition on getting out of the business or a
[9] special requirement to receive a different form of
[10] state certification to do the sale than a business
[11] selling toasters or adding machines would have.

[12] Q: Anything else that you can think of?

[13] A: I — a specific requirement to price based
[14] on some state prescribed costing methodology in much
[15] would absolutely be prohibited. The term that I
[16] tried to use is anything that looks like tariff
[17] regulation or constitutes de facto tariff regulation,
[18] and there is a very, very wide range of highly
[19] detailed different examples I could try and give.
[20] I'm — ad infinitum. I hope I have — I mean if my
[21] answer doesn't satisfy you, I will go on and try to
[22] do more.

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[1] Q: If you can think of some more, I want you
[2] to tell me but —
[3] A: Sure. I can think of lots of more.
[4] Q: Okay.
[5] A: A requirement that a seller couldn't change
[6] price without notice for X days. A requirement to
[7] maintain a publicly available —
[8] Q: That couldn't change price?
[9] A: Yes.
[10] Q: Without notice?
[11] A: Yes. Yes. I mean if somebody said you
[12] can't raise the price of a piece of — of a telephone
[13] that's on the shelf without publishing it in the
[14] paper seven days in advance of doing so, your intent
[15] to do so. A requirement that — that goes beyond,
[16] once again, what a seller of adding machines have,
[17] that you have — make certain provisions to handle
[18] consumer inquiries, complaints, to receive notice,
[19] things that are the equivalent of tariff regulation,
[20] the historic tariff regulation. I don't believe a
[21] state is free to impose those on sellers of CPE.
[22] Q: You were talking about the sales of CPE on

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[1] that?
[2] A: Yes, on sellers of CPE.
[3] Q: Lessors, doesn't the same apply?
[4] A: Yes.
[5] Q: Or is there a different set of rules for
[6] lessors?
[7] A: "Set of rules" is not the phrase I will
[8] use.
[9] Q: I understand.
[10] A: Because here I would say because leasing is
[11] even closer to the traditional provision of telephone
[12] instruments, CPE, residential CPE under tariff,
[13] that — it — there probably is an even more
[14] limited — I'm not — I'm not sure if there is. I
[15] mean I'm trying to think of a specific example of
[16] something that the state couldn't tell a lessor they
[17] had to do or couldn't do, that they could tell a
[18] seller. I'm just not sure. I —
[19] Q: Can you tell me how state consumer
[20] protection laws stand as an obstacle to the
[21] accomplishment of the FCC's purpose of a competitive
[22] CPE marketplace?

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[1] A: Yes. I — the basic impediment the FCC
[2] found to a competitive CPE marketplace was state
[3] action, which I don't — I'm not claiming bad motives
[4] for, but, basically, was designed to make telephone
[5] companies, including AT&T, offer their CPE to
[6] consumers at significantly better prices, terms and
[7] conditions than required by the marketplace. That
[8] forecloses competitors.
[9] Q: My question to you —
[10] A: So —
[11] Q: — was state consumer protection laws.
[12] A: Right. So insofar as the result of a state
[13] consumer protection law is to require — a CPE is to
[14] require exactly that result, i.e., if state consumer
[15] protection law is implemented and forced or written
[16] in such a way as to require AT&T to provide CPE on —
[17] at prices or on terms and conditions better than
[18] demanded by the marketplace, it is foreclosing
[19] competitors from having a fair chance to win those
[20] customers.
[21] Q: Now, a few minutes ago, you told me that
[22] any claims made by plaintiffs' experts that the

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[1] embedded base customers, by virtue of the way in
[2] which the modified negative option took place, should
[3] be afforded a higher level or higher standard of,
[4] let's say — let's pick some action. Let's say
[5] notice. To the extent by virtue of the way that AT&T
[6] acquired that customer base, that making a claim
[7] predicated upon that would be preempted; right?
[8] A: Yes. Yes.
[9] Q: Is that express or implied?
[10] A: Implied.
[11] Q: Any basis for — strike that.
[12] What's your basis or conclusion as to why
[13] it is impliedly preempted?
[14] A: Because the FCC made specific
[15] determinations about what type of notice should be
[16] given, what type of rate protection should be given,
[17] what type of initial determine — option should be
[18] given. States came into the FCC and said, "We don't
[19] agree with this. We think you should do something
[20] different." The FCC looked at it, made a
[21] determination and said no. Somebody could
[22] continue — could file, in accordance with the rules,

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[1] political turmoil taking place around
[2] telecommunications and legal turmoil, even if the FCC
[3] had been upheld in circumstances like that, several
[4] years of fighting over it was deemed to be very, very
[5] negative to the public interest, so I urged this
[6] course and, once again —

[7] Q: You urged what course?

[8] A: The course of negotiating with AT&T.

[9] Q: That the FCC direct AT&T to file its own
[10] proposal?

[11] A: That the FCC informally direct AT&T to file
[12] a proposal on the basis of what we would negotiate
[13] with them as the — a proper proposal and that that
[14] would be endorsed by the FCC.

[15] Q: When did you tell them to do that? We are
[16] in the spring of '83, aren't we?

[17] A: We are in before that, that we told them to
[18] do that.

[19] Q: Okay. So —

[20] A: It would have been in — I would say in mid
[21] '82 to late '82, probably, that we started talking
[22] about the CPE thing itself.

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[1] Q: What were you doing, then, tell me step by
[2] step, the things you were doing in, you personally,
[3] in the spring of 1983, before you left with respect
[4] to the notice. What were you doing?

[5] A: With respect to the notice?

[6] Q: Yes.

[7] A: I — I can't remember what I did with
[8] respect to the notice specifically. I would assume
[9] that some drafts of it were prepared for me but
[10] the — insofar as the notice was designed to put out
[11] the AT&T proposal, I think I know when I left, it was
[12] well understood that the FCC would, subject to minor
[13] tinkering as the result of the comments, would adopt
[14] that proposal.

[15] Q: Okay. And then you left in June of '83?

[16] A: Yes.

[17] Q: And what did you work on starting in that
[18] summer for AT&T?

[19] A: Long-term deregulation.

[20] Q: Of what?

[21] A: Tariff communication services,
[22] long-distance services, primarily private line and

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[1] wants. At that point it was not focused on any
[2] residential MTS services. It was high volume
[3] business transmission services which were then
[4] subject to some competition and which AT&T was very,
[5] very anxious to receive more flexibility to be able
[6] to lower prices.

[7] Q: Were you in the fall, let's say through '82
[8] and the spring of '83, involved in the negotiations
[9] with AT&T?

[10] A: On CPE?

[11] Q: Yes.

[12] A: Yes.

[13] Q: And what were you doing day to day in those
[14] negotiations with AT&T on behalf of the Federal
[15] Communications Commission?

[16] A: Discussing what — how far AT&T was
[17] prepared to go in terms of providing price
[18] protections and other benefits to competitors and
[19] customers.

[20] Q: Who were you talking to at AT&T?

[21] A: At AT&T, there were a number of people that
[22] I can remember who were very involved in this. Dan

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[1] Kulkin would be one, George Moreland would be one,
[2] William Stump would be one, Jim Billingsly was the —
[3] the prime one who was closest to — to being able to
[4] make a decision on it. John Zieglus was another who
[5] was quite involved, and I believe at this point
[6] Howard Trinens was also involved — Howard Trinens
[7] was also involved in this, Bob Allen, Robert Allen,
[8] was one of the people who was involved in discussing
[9] this. Jim Olson, James Olson, was another person.
[10] Those are the — the people that I specifically
[11] recall at AT&T.

[12] Q: Did you ever deal with a man named Harold
[13] Burlingame?

[14] A: I don't believe so. On this? I met him, I
[15] think, once or twice but —

[16] Q: How did you meet him?

[17] A: At functions, I think.

[18] Q: What functions?

[19] A: The — AT&T would regularly sponsor things
[20] like art shows, you know, they sponsor an exhibit at
[21] one of the national galleries and would invite all
[22] the staff at the FCC. In addition, there would be a

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[1] Christmas party that would be held, functions like
[2] that.

[3] Q: And the FCC staff would be invited to the
[4] Christmas party?

[5] A: Yes.

[6] Q: Did you go to those events?

[7] A: To some of them, yes.

[8] Q: Where did you have your Christmas parties,
[9] the ones that AT&T sponsored for the FCC?

[10] MR. BENNETT: Objection to the form of the
[11] question.

[12] THE WITNESS: One of them I remember was in
[13] the — the building where their offices — I don't
[14] know if they still are there but certainly were
[15] there. I think it is called Lafayette Square. It is
[16] between 20th and 21st, between L and M. That —
[17] that's one that I very specifically remember.

[18] BY MR. TILLERY:

[19] Q: Now, at these Christmas parties and other
[20] functions, did employees of AT&T come and mix with
[21] the FCC staff and talk to them?

[22] A: Yes.

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[1] Q: Get to know them?

[2] A: Yes.

[3] Q: Was there negotiation during some of these
[4] events, too — discussions, at least?

[5] A: I — I can't specifically recall one but I
[6] think it is fair to say that on occasion, there was,
[7] not generally, but on occasion. There could be some,
[8] yes.

[9] Q: Were you involved, as far as you know, in
[10] all of the negotiation with AT&T regarding CPE?

[11] MR. BENNETT: Objection to the form of the
[12] question. It is vague.

[13] BY MR. TILLERY:

[14] Q: In this time period, '82, '83 time period?

[15] MR. BENNETT: My form of the objection goes
[16] to the word "involved."

[17] THE WITNESS: No, I don't believe so.

[18] BY MR. TILLERY:

[19] Q: Who else at the FCC was negotiating with
[20] the AT&T company?

[21] A: The other people would have been Jim Smith,
[22] Gary Epstein, Mark Fowler, Randy Nichols, Jerry

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[1] Fritz. Those are the people who —

[2] Q: Who is Jim Smith? Is he the fellow you ran
[3] into on the street a few weeks ago?

[4] A: He at the time was a legal assistant for
[5] the chief of the Common Carrier Bureau.

[6] Q: What did these people do that you just
[7] referenced at FCC? What were their jobs?

[8] A: I just told you Jim Smith.

[9] Q: Right.

[10] A: Gary Epstein was chief of the Common
[11] Carrier Bureau. Mark Fowler was chairman of the
[12] FCC. Randy Nichols was his chief of staff. Jerry
[13] Fritz was his common carrier assistant. Let me just
[14] also say that I — I am certain that particularly on
[15] a number of minor details, and probably other things,
[16] as well, the — that other people negotiated. The —
[17] I'm trying to think about whether it was on this.
[18] Certainly on any matter that related to enforcement,
[19] specifically with respect to multi-line CPE, Kathy
[20] Levitz would have been involved, and Greg Vogt, as
[21] well. In addition — and those were the — the chief
[22] and deputy chief of what was called the CI-2 task

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[1] force that was a body set up to ensure compliance
[2] with the CI-2 rules, primarily focusing on separate
[3] subsidiary matters but getting involved to some
[4] extent in multi-owned CPE pricing matters and looking
[5] at other matters, as well. They would have been
[6] involved in discussing. I'm also certain that other
[7] staff level attorneys would — I'm not sure whether
[8] they would be characterized as negotiation but were
[9] involved in information flow.

[10] Q: How did all of this, these discussions,
[11] wind their way into a conclusion on behalf of the
[12] FCC, all these people talking, Christmas parties and
[13] social events and daily phone discussions and
[14] meetings, how did all this work its way into a finite
[15] pattern?

[16] A: I would say — I'm not sure that there is a
[17] simple answer to that. It is important to
[18] recognize. There was a tremendous amount of
[19] political input on this, as well. With regularity,
[20] and what's going on — a day didn't go by that we
[21] didn't get input from a congressional staff and
[22] occasionally from members of Congress themselves. We

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[1] A: That would be an example of it.
[2] Q: Right.
[3] A: You are saying, "Unless you notify us."
[4] You had a formulation that is, in fact, a negative
[5] option. "If you don't notify us that you want to
[6] change, we are — we will deem you to have decided to
[7] continue to lease."
[8] Q: Are negative options considered to be
[9] anti-consumer practices, generally?
[10] MR. BENNETT: Objection to the form of the
[11] question.
[12] MR. TILLERY: Not of the answer?
[13] THE WITNESS: I'm not sure what "considered
[14] to be" means. I think that while there are a fair
[15] number of special circumstances that — where they
[16] end up being pro-consumer, that the majority of cases
[17] in which a negative option is utilized is —
[18] certainly would not be favored by most of the — the
[19] professional consumer organizations or consumer
[20] rights — the professional consumer rights advocates.
[21] BY MR. TILLERY:
[22] Q: What is your belief about them?

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[1] A: All things being equal, I don't like them.
[2] Q: Why not?
[3] A: I think that getting people to make an
[4] affirmative choice is a significantly better way to
[5] reflect their actual wishes or desires.
[6] Q: As opposed to a default mechanism which
[7] creates a customer?
[8] MR. BENNETT: Objection to the form of the
[9] question.
[10] BY MR. TILLERY:
[11] Q: Correct?
[12] A: Well, in the example you gave, I mean,
[13] either creates a customer. One determines — it
[14] determines which type of customer they are, in your
[15] example, but in which you, basically, say, if you
[16] don't do anything, we are going to deem — we are
[17] going to figure out that we know what you — what you
[18] want. And the reason for that is that certainly in
[19] the communications field, there is no question at all
[20] that at the time we were devising this, we were well
[21] aware of the difficulty, particularly in the
[22] post-divestiture environment, of getting people to

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[1] make affirmative responses, so we knew that there
[2] would be — that if it — if it was raised that way,
[3] it would be deemed to be encouraging people to
[4] stay — we are not talking about the specifics here,
[5] we are just talking about generally now or in this
[6] specific case?
[7] Q: Well, you were asking me? Let's do them
[8] both.
[9] A: Okay. Generally, then, I just say, you
[10] know, it would produce a lot of people who just, in
[11] addition to those who affirmatively would decide not
[12] to send in, because it was easier, some people who
[13] were close to indifferent and would decide it was
[14] easier not to send in and some people who never read
[15] it or whatever who would be deemed to have here. In
[16] this particular case, the — there was an interest on
[17] the part of the FCC in promoting competition. The
[18] FCC deals with the broad public interest, which
[19] includes consumers, regulated entities, and
[20] competitors of regulated entities, and I think the
[21] view was, and this was a view that was urged on us by
[22] competitors, in particular —

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[1] Q: Who is "us" in your answer?
[2] A: The FCC collectively, including the staff
[3] and the Commission.
[4] Q: Okay. Go ahead.
[5] A: — that was urged on us to not make it too
[6] easy for AT&T to retain these customers.
[7] Q: And what did you do?
[8] A: We adopted what we call the modified
[9] negative option.
[10] Q: Why was it called "modified"?
[11] A: Because AT&T was under a specific
[12] obligation not to tell people, "If you do nothing,
[13] you will continue to lease your phone." They were
[14] told they had to tell people you have to make a
[15] choice between buying or leasing your phone and you
[16] can't discuss in any way whatsoever what happens if
[17] they don't. You can't do anything to — in fact, it
[18] said explicitly, "You also cannot make it any easier
[19] to choose one of these two paths."
[20] Q: Did you get involved in this 1983 notice?
[21] A: Yes.
[22] Q: What was your role?

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[1] A: I was probably on the line between who
[2] was — who was the number one negotiator in deciding
[3] it. They were collective. I was not the most senior
[4] person there at that time but this was a matter
[5] within my jurisdiction to develop a plan and the
[6] person who was my superior then might say he was the
[7] most important person because he made the final call
[8] on it but it was —

[9] Q: When was the final call made?

[10] A: The final call was made at two different
[11] levels. The final call, first of all, in telling
[12] AT&T what we wanted them to file, the informal
[13] negotiations was made, I would say, probably six
[14] weeks to their filing — prior to filing their letter
[15] making this proposal.

[16] Q: When would that have been, if you can give
[17] me a date?

[18] A: I guess March or April.

[19] Q: March or April of '83?

[20] A: Yes.

[21] Q: They filed a letter?

[22] A: I think they filed it a little bit — I

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[1] can't remember. I think they filed it in April and
[2] May.

[3] Q: Okay. And then what did you do after that?

[4] A: Personally or the Commission?

[5] Q: You, personally.

[6] A: With the letter?

[7] Q: Yes.

[8] A: We put it out for public comment.

[9] Q: Had you done something drafting anything
[10] before that time?

[11] A: Anything?

[12] Q: Yes, with respect to that letter, to the
[13] notice.

[14] A: Yes, I mean I — we — I think it was
[15] fairly routine to put the public notice out, you
[16] know, putting the letter on notice and telling other
[17] people to come in and — and file on it. But at the
[18] time, we were having daily conversations with all
[19] interested parties every single day. The — which at
[20] this point was very confusing because it involved not
[21] just the people who had been in this docket
[22] throughout the entire period of time, they had AT&T,

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[1] the competitors, the states, but because this was
[2] between the announcement and implementation of
[3] divestiture, we had these new regional holding
[4] companies which were staffed and which — there was a
[5] lot of controversy about what degree of autonomy they
[6] should have but each and every one of them, by this
[7] point, had their own federal regulatory people,
[8] lawyers, managers, and all, and they had a major
[9] interest in this, as well, so it was all this
[10] multiparty discussion.

[11] Q: So walk me through your role. You were
[12] talking about April or May of 1983. Walk me through
[13] what you did personally.

[14] A: After the announcement of divestiture, the
[15] FCC, basically, halted the Computer II detariffing
[16] process for embedded CPE because this was a
[17] significant event which impacted in major ways all
[18] regulatory activities. Most people view it as the
[19] single most major event in the field of
[20] telecommunications generally, as well as the
[21] regulation of telecommunications. And so the FCC
[22] decided that it was appropriate to — to come up with

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[1] a plan about how to deregulate embedded CPE. They
[2] also decided — and I say this was a unanimous
[3] decision that all the staff, the commissioners,
[4] everybody understood this, because these were matters
[5] under my jurisdiction, I participated in meetings
[6] that made this decision at the staff level and
[7] briefings of the chairman, as well. In addition, it
[8] was my view, which I urged and which I think was
[9] accepted by the chief of the Common Carrier Bureau
[10] and certainly by the chairman of the FCC, that there
[11] were significant legal risks involved in attempting
[12] to impose too onerous conditions on AT&T with respect
[13] to the detariffing of CPE and that the most
[14] appropriate mechanism to provide an order that was a
[15] good balance between the segments of the public
[16] interest and what was politically sustainable was to
[17] have AT&T "voluntarily," and I use the word in
[18] quotes, this is the way the FCC always worked, submit
[19] a plan which could be approved by the FCC rather than
[20] have the FCC issue an order that AT&T would take to
[21] court saying you don't have the power to do this,
[22] which, in a very chaotic era, with all types of